criminal procedure
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3&4

Misdemeanor Arraignments & Pleas

Felony Arraignments in District Court, Third Edition

Monographs 3 & 4:
Misdemeanor Arraignments & Pleas
and
Felony Arraignments in District Court

Third Edition

Criminal Procedure Monograph Series 1–8

Michigan Judicial Institute

By **Phoenix Hummel, J.D.**

Michigan Supreme Court

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The research done on these monographs is current through December 1, 2005. These monographs are not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Acknowledgments

Criminal Procedure Monographs 3 & 4: *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court (Third Edition)* supersede the revised edition of these monographs, published in 2004. This edition brings up to date the applicable statutes, court rules (including amendments to the rules governing criminal procedure effective January 1, 2006), and case law.

MJI staff members Leonhard J. Kowalski, Dawn F. McCarty, and Margaret Vroman authored the 1992 edition. Jennifer Vroman served as publication secretary and page layout designer. The original editorial advisory committee members for monographs 3 & 4 were Hon. Patrick C. Bowler, 61st District Court, Grand Rapids; Hon. James P. Coyle, 9th District Court (1st Division), Kalamazoo; and Hon. William G. Kelly, 62B District Court, Kentwood. The 1992 edition was funded in part by a grant from the W.K. Kellogg Foundation.

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Criminal Procedure Monographs 3 & 4: *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court (Third Edition)* are part of MJI's Criminal Procedure Monograph Series. The series contains the following titles:

- Monographs 1 & 2: *Issuance of Complaints & Arrest Warrants* and *Issuance of Search Warrants (Third Edition)*
- Monographs 3 & 4: *Misdemeanor Arraignments & Pleas* and *Felony Arraignments in District Court (Third Edition)*
- Monograph 5: *Preliminary Examinations (Third Edition)*
- Monograph 6: *Pretrial Motions (Third Edition)*
- Monograph 7: *Probation Revocation (Third Edition)*
- Monograph 8: *Felony Sentencing*

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Misdemeanor Arraignments & Pleas

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Part A—Commentary on Misdemeanor Arraignments

Part B—Commentary on Pleas

Part A—Commentary on Misdemeanor Arraignments

3.1 Applicable Court Rules

MCR 6.001(B) lists the court rules that govern the procedure by which criminal cases cognizable in district court should be conducted:

- MCR 6.001–6.004 (scope, purpose and construction, definitions, speedy trial);
- MCR 6.006* (video and audio proceedings);

*Effective January 1, 2006.

- MCR 6.102* (arrest on a warrant);

*Effective January 1, 2006.

- MCR 6.106 (pretrial release);
- MCR 6.125 (competency hearing);
- MCR 6.427 (judgment);
- MCR 6.445(A)–(G)* (probation revocation);

*Effective January 1, 2006.

- MCR 6.610 (district court criminal procedure);
- MCR 6.615 (misdemeanor traffic cases);
- MCR 6.620 (jury impaneling); and
- MCR 6.625 (legal counsel on appeal).

MCR 6.001(B) specifically indicates that the court rules listed above "govern matters of procedure in criminal cases cognizable in the district courts." Because a district court's jurisdiction is limited by statute to misdemeanors punishable by not more than one year of imprisonment, the rules included in MCR 6.001(B) do not refer to "serious" or "high court" misdemeanors for which two years of imprisonment may be imposed. Although the author of this monograph has made every effort to eliminate any confusion that could be caused by unqualified use of the term "misdemeanor," a cautionary reminder to the reader is appropriate. Because not all misdemeanors are cognizable in district court, this monograph will repeatedly distinguish between those misdemeanor offenses cognizable in district court and misdemeanor offenses in general.

Many court rules in Chapter 6 (the chapter containing court rules governing criminal procedure, in general) are not expressly noted in MCR 6.001(B) as applicable to proceedings that involve misdemeanor offenses cognizable in district court. However, rules not specifically mentioned in MCR 6.001(B) may be instructive in situations when no court rule specific to district court

procedure is supplied elsewhere. For example, MCR 6.005 (not listed by MCR 6.001(B)) addresses a defendant's right to counsel—a due process consideration that is frequently, but not always, at issue in criminal misdemeanor cases. In a misdemeanor case where the accused is entitled to counsel, MCR 6.005 contains detailed instructions not found in MCR 6.610(D)(2) and (E)(2), the sections pertaining specifically to a *misdemeanor* defendant's right to counsel in district court. Similarly, MCR 6.104(B) discusses the place of arraignment and, although the rule is not specifically cited by MCR 6.001(B), it may be helpful in handling misdemeanor cases cognizable in district court. In addition to those "Chapter 6" rules not expressly noted in MCR 6.001(B), the rules of civil procedure apply to criminal cases unless a statute or court rule provides a similar or different procedure applicable to the circumstances. MCR 6.001(D).

MCR 6.001(E) addresses and resolves any conflict that may exist or arise between the criminal procedure outlined in Chapter 6 of the court rules and any statutory provisions concerning the same procedure:

> "The rules in [Chapter 6] supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter."

3.2 Jurisdiction and Venue in District Court

A. Jurisdiction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317.

> "The district court shall have jurisdiction of:
>
> > "(a) Misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both.
> >
> > "(b) Ordinance and charter violations punishable by a fine or imprisonment, or both.
> >
> > "(c) Arraignments, the fixing of bail and the accepting of bonds.
> >
> > "(d) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court, but there shall not be a preliminary examination for any misdemeanor to be tried in a district court." MCL 600.8311.

The Michigan Code of Criminal Procedure, MCL 760.1 *et seq.*, defines "felony" as a violation of Michigan's penal law for which a person, if convicted of the offense, may be punished by death or by imprisonment for more than one year or an offense specified by law to be a felony. MCL 761.1(g). See also MCL 750.7 (Penal Code's definition of felony). The Michigan Penal Code defines "misdemeanor" as an act or omission that is not a felony, that is punishable by law or discretion of the court with a fine, penalty or forfeiture, or imprisonment. MCL 750.8. Generally, misdemeanors are offenses punishable by not more than one year of imprisonment or violations of a state agency's orders, rules, or regulations punishable by imprisonment or a fine other than a civil fine. MCL 761.1(h). Some misdemeanors are classified as "minor offenses," violations for which the maximum permissible imprisonment does not exceed 92 days, and the maximum fine does not exceed $1,000.00. MCL 761.1(k).

Criminal conduct near county boundary lines. When an offense is committed within one mile of the boundary line between two counties, jurisdiction is proper in either county. MCL 762.3(1) provides:

> "Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

Identity theft. Pursuant to MCL 762.10c(1), violations of the Identity Theft Protection Act,* MCL 445.71 *et seq*., may be prosecuted in any one of the following jurisdictions:

*2004 PA 452, effective March 1, 2005.

- where the offense occurred.
- where the information used to commit the violation was illegally used.
- where the victim resides.

If an individual is charged with multiple counts of identity theft and the violations could be prosecuted in more than one jurisdiction, all violations may be properly prosecuted in any of the applicable jurisdictions. MCL 762.10c(2).

B. Venue

For a district of the **first class,** venue for criminal actions is in the **county** where the violation occurred. MCL 600.8312(1).

> *A district of the first class consists of one or more counties, where each county is responsible for maintaining, financing, and operating the district court within its county.* MCL 600.8103(1).

For a district of the **second class,** venue for criminal actions is in the **district** where the violation occurred. MCL 600.8312(2).

> *A district of the second class consists of a group of political subdivisions within a county, where the county is responsible for maintaining, financing, and operating the district court within its county.* MCL 600.8103(2).

For a district of the **third class,** venue for criminal actions is in the **political subdivision** where the violation occurred, except that when the violation occurred in a political subdivision where the court is not required to sit, venue is proper in any political subdivision where the court is required to sit. MCL 600.8312(3).

> *A district of the third class consists of one or more political subdivisions within a county, where each political subdivision is responsible for maintaining, financing, and operating the district court within its political subdivision.* MCL 600.8103(3).

Criminal conduct near county boundary lines. "If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned." MCL 762.3(3)(a).

Multiple counties affected by an offense. Even though the effects of a crime may extend to more than one county, venue is not proper in a county where none of the criminal acts necessary to the commission of the crime occurred. *People v Webbs*, 263 Mich App 531, 534–535 (2004).

MCL 762.8 permits prosecution of a felony in any county where any one criminal act occurred when the felony offense is made up of more than one criminal act. However, according to *Webbs*, the statute does not make venue proper in a county merely "affected" by the felony; venue is proper in a county affected by the crime if "th[e] alleged effects are [] essential to the charged offense." *Webbs, supra* at 536 (footnote omitted).

3.3 A District Court Magistrate's Authority

*See pages 8-9 for a list of these offenses.

Subject to the chief district judge's approval, district court magistrates generally have the authority to issue arrest warrants, conduct arraignments, fix bail and accept bond, accept pleas for specified offenses, and impose sentences for specified offenses.* MCL 600.8511(a)–(e).

> **Note:** The terms "magistrate" and "district court magistrate" are not always synonymous. According to the Code of Criminal Procedure, a "magistrate" is a district court judge or a municipal court judge, but a "magistrate" is not a "district court magistrate." MCL 761.1(f). The term "district court magistrate" is specifically

used in the Code of Criminal Procedure when the subject matter involves a district court magistrate. But the Code of Criminal Procedure also states that a "district court magistrate" may exercise the powers, jurisdiction, and duties of a "magistrate" if expressly authorized by the Revised Judicature Act, MCL 600.101 *et seq*. That is, if authorized by law, a "district court magistrate" may exercise the powers and duties of a municipal court or a district court judge. MCL 761.1(f).

Note also that MCR 6.003(4) recognizes the distinction between a "magistrate" and a "district court magistrate." MCR 6.003(4) defines "court" or "judicial officer" as "a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." A district court magistrate's authority is also subject to conditions found in MCR 4.401(A)–(B), which provide:

> **"(A) Procedure.** Proceedings involving magistrates must be in accordance with relevant statutes and rules.
>
> **"(B) Duties.** Notwithstanding statutory provisions to the contrary, magistrates exercise only those duties expressly authorized by the chief judge of the district or division."

Arrest warrants. A district court magistrate may issue arrest warrants for felonies, misdemeanors, and ordinance violations pursuant only to the written authorization of the prosecuting attorney or municipal attorney. MCL 764.1(1)–(2) and MCL 600.8511(d). A district court magistrate needs no authorization to issue a warrant for the arrest of an individual to whom a police officer issued a traffic citation under MCL 257.728 if the individual failed to appear in court when required.* MCL 600.8511(d).

*See Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants–Third Edition* (MJI, 2006), for a more complete discussion of issuing arrest warrants.

Arraignments. A district court magistrate may, as authorized by statute and by the judges of the district, conduct arraignments in cases involving a misdemeanor traffic violation. MCR 6.615(C)(2). MCL 600.8513(1) states that

> "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, . . . but this section shall not authorize any district court magistrate to accept a plea of guilty or nolo contendere [no contest] not expressly authorized pursuant to section 8511 or 8512a."

Fixing bail and accepting bond. Without any apparent qualification, a district court magistrate has a duty "[t]o fix bail and accept bond in all cases." MCL 600.8511(e). See SCAO Form MC 241 (Bond).

Civil infractions, misdemeanors, and ordinance violations not punishable by imprisonment. To the extent authorized by the chief judge, presiding judge, or only judge of the district, MCL 600.8512a permits a district court magistrate to:

> "(a) Accept an admission of responsibility and order civil sanctions for a civil infraction and order an appropriate civil sanction permitted by the statute or ordinance defining the act or omission.
>
> "(b) Accept a plea of guilty or nolo contendere and impose sentence for a misdemeanor or ordinance violation punishable by a fine and which is not punishable by imprisonment by the terms of the statute or ordinance creating the offense."

Guilty pleas and nolo contendere pleas to offenses punishable by imprisonment. MCL 600.8511(a) provides that a district court magistrate has the jurisdiction and duty "[t]o arraign and sentence upon pleas of guilty or nolo contendere for violations of the following acts or parts of acts, or a local ordinance substantially corresponding to these acts or parts of acts, when authorized by the chief judge of the district court and if the maximum permissible punishment does not exceed 90 days in jail or a fine, or both."

- MCL 324.48701 to 324.48740 (sport fishing)
- MCL 324.40101 to 324.40119 (wildlife conservation)
- MCL 324.80101 to 324.80199 (Marine Safety Act)*
- MCL 475.1 to 479.43 (Motor Carrier Act)
- MCL 480.11 to 480.22 (Motor Carrier Safety Act of 1963)
- MCL 287.261 to 287.290 (Dog Law of 1919)
- MCL 436.1703 and 436.1915 (Liquor Control Code)
- MCL 324.501 to 324.511 (DNR Commission)
- MCL 324.8901 to 324.8907 (littering)
- MCL 324.43501 to 324.43561 (hunting/fishing licensing)
- MCL 324.73101 to 324.73111 (recreational trespass)
- MCL 750.546 to 750.552b (wilful trespass)

*See Section 3.20 for a detailed discussion of arrest and arraignment procedure following a person's alleged violation of the Marine Safety Act.

Michigan Vehicle Code violations. Except for violations of MCL 257.625 (OUIL) and 257.625m (OUIL/commercial vehicle), and local ordinances substantially corresponding to those provisions, MCL 600.8511(b) permits a district court magistrate (if authorized by the chief district judge) to arraign and sentence defendants on pleas of guilty or no contest for violations of the

Michigan Vehicle Code (or violations of local ordinances substantially corresponding to a provision of the Vehicle Code), as long as the maximum permissible punishment does not exceed 93 days in jail, a fine, or both. However, a district court magistrate may be authorized to arraign defendants and set bond for violations of MCL 257.625 and 625m or substantially corresponding local ordinances. MCL 600.8511(b).

ORV and snowmobile violations. Similarly, when authorized by the chief district judge and if the maximum permissible punishment does not exceed 93 days in jail, a fine, or both, MCL 600.8511(c) permits a district court magistrate to arraign and sentence defendants on pleas of guilty or no contest for violations of MCL 324.81101 to 324.81150 (ORV licensing) and MCL 324.82101 to 324.82160 (snowmobiles) or violations of a local ordinance substantially corresponding to one of these statutory provisions. The district court magistrate's authority to arraign and sentence does not extend to guilty or no contest pleas for violations of MCL 324.81134 and 324.81135 (OUIL/ ORVs) or MCL 324.82128 and 324.82129 (OUIL/snowmobiles), although a district court magistrate may have jurisdiction over arraignments and setting bond for those four violations. MCL 600.8511(c).

Appointing counsel. Provided the district's chief judge has so authorized, a district court magistrate may "[a]pprove and grant petitions for the appointment of an attorney to represent an indigent defendant accused of any misdemeanor punishable by imprisonment for not more than 1 year or ordinance violation punishable by imprisonment." MCL 600.8513(2)(a). See SCAO Form MC 222 (Petition/Order for Court Appointed Attorney).

Appealing a district court magistrate's ruling. A party may appeal as of right any decision of the district court magistrate to the district court in which the magistrate serves. MCR 4.401(D). The appeal must be in writing, must be made within seven days of the entry of the decision being appealed, and should substantially comply with the form outlined in MCR 7.101(C). MCR 4.401(D). Except as otherwise provided by statute or court rule, no fee is required to file an appeal of a district court magistrate's ruling. *Id*. The district court hears the matter *de novo*. *Id*.

District court judge's control of magisterial action. MCR 4.401(C) states that "[a]n action taken by a magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves."

> **Note:** MCR 4.401(C) does not expressly distinguish between "magistrate" and "district court magistrate."

3.4 Record Requirements

Except as provided by law or supreme court rule, all proceedings in district court shall be recorded by the district court recorder by the use of approved

recording devices or taken by the district court reporter. MCL 600.8611; MCL 600.8331.

MCR 6.610(C) advises that, unless a writing is permitted, a verbatim record must be made of district court proceedings listed in MCR 6.610(D), (E), and (F). MCR 6.610(D) deals solely with arraignments in misdemeanor cases and provides that a writing may be used to inform a defendant of the offense, the maximum sentence, and the defendant's rights. MCR 6.610(E) addresses pleas of guilty or nolo contendere and similarly allows a defendant to be informed of his or her rights in writing. A writing may **not** be used to satisfy the record requirements of a sentencing proceeding under MCR 6.610(F).

3.5 Arraignment on Arrest by Warrant

A defendant arrested with (or without) a warrant for a misdemeanor offense is statutorily entitled to an arraignment.

A. When Arrest Is Made in Same County Where Charged Offense Occurred

A warrant for an individual's arrest must direct the arresting officer to take the arrestee, without unnecessary delay, before a magistrate of the judicial district in which the charged offense occurred. MCL 764.1b.

"Taken before" or "brought before" a magistrate or judge for purposes of arraignment or setting bail means either of the following:

(*i*) physical presence before a judge or district court magistrate, or

(*ii*) presence before a judge or magistrate through use of a two-way closed circuit television.

MCL 761.1(u).

*Effective January 1, 2006.

A new court rule, MCR 6.006, expressly applicable to criminal procedure in district court, permits the use of two-way interactive video technology in specified situations.* In part, MCR 6.006 states:

> **"(A) Defendant at a Separate Location.** District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignment on the warrant, arraignments on the information, pretrials, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations."

Use of video and audio technology under MCR 6.006 must comply "with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).*

*Effective January 1, 2006.

Interim bail. MCR 6.102, a rule that addresses arrests on a warrant, is expressly applicable to matters of procedure involving misdemeanor offenses over which the district court has jurisdiction. MCR 6.001(D).* MCR 6.102(F) states:

*As amended, effective January 1, 2006.

> **"(F) Release on Interim Bail.** If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that
>
> > "(1) the accused is arrested prior to the expiration date, if any, of the bail provision;
> >
> > "(2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;
> >
> > "(3) the accused is not under the influence of liquor or controlled substance; and
> >
> > "(4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail."

Provisions similar to those in MCR 6.102(F) are also found in MCL 780.581 (interim bail and warrantless arrests), which, subject to the conditions of MCL 780.582a, is made applicable to arrests on warrants by MCL 780.582.

B. When Arrest Is Made in County Different From Where Offense Occurred

MCL 764.4 governs misdemeanor arrests by warrant when the arrest and the charged offense do not occur in the same county. If an individual is arrested on a warrant for an offense committed in a different county and the offense is one for which bail may not be denied, the arrestee has the right to request and to be taken before a magistrate of the judicial district in which he or she was arrested. MCL 764.4. In those circumstances:

- The magistrate before whom the accused appears may take from the person a recognizance with sufficient sureties for the accused's

appearance within ten days before a magistrate in the same district where the charged offense occurred. MCL 764.5.

- The magistrate must certify on the recognizance that the accused was permitted to post bail and must deliver the recognizance to the arresting officer. Without unnecessary delay, the arresting officer must see that the recognizance is delivered to a magistrate or clerk of the court where the accused will be appearing. MCL 764.6.

- If the magistrate refuses to permit the arrestee to post bail or if insufficient bail is offered, the official having charge of the arrestee must take him or her before a magistrate in the judicial district where the charged offense was committed. MCL 764.7.

- Unless the alleged offense is a violation of MCL 764.15a, 750.81, or 750.81a, the interim bond provisions in MCL 780.581 (similar to the provisions in MCR 6.102(F), discussed above, and MCL 780.581, discussed briefly in Section 3.6, below) apply to misdemeanor arrests by warrant. MCL 780.582 and 780.582a(1).

*As amended, effective January 1, 2006.

> **Note:** Although MCR 6.001(B) omits MCR 6.104 from its list of court rules applicable to procedural matters involving offenses over which the district court has jurisdiction, the rule does not expressly prohibit its use with regard to misdemeanor arrests by warrant. MCR 6.104(B) requires that an individual arrested by warrant be taken to the court named in the warrant. If an accused is arrested in a county other than the one in which the offense occurred and other than the county named in the arrest warrant, the arresting agency must make arrangements with the proper county for the accused's prompt transportation to that county. MCR 6.104(B). Two-way interactive video technology as authorized by MCR 6.006(A) may be used to satisfy the requirements of MCR 6.104(B).*

*As amended, effective January 1, 2006.

> If an accused first appears before the court in a county other than the one in which the offense occurred or, if arrested by warrant, in a county not listed in the arrest warrant, and the accused is not represented by counsel, the court must advise the accused of certain rights and decide whether to release the accused before trial. MCR 6.104(C). An accused's first appearance under MCR 6.104(C) may be "by way of two-way interactive video technology[.]" MCR 6.104(C).*

3.6 Arraignment on Arrest Without a Warrant

With only specific exceptions, a police officer may not arrest a person without a warrant for a misdemeanor unless the offense was committed in the officer's presence. MCL 764.15(1) and MCL 764.15a. Consequently, arraignments for warrantless misdemeanor arrests are most frequently held in the district where the misdemeanor occurred.

Two important exceptions to the warrant requirement for misdemeanor arrests are OUIL (vehicle, snowmobile, or ORV) and domestic assault. MCL 764.15(1)(h)–(k) and 764.15a. In addition, a police officer who has reasonable cause to believe a person committed a misdemeanor offense punishable by more than 92 days of imprisonment may arrest that person without a warrant and without having witnessed the criminal conduct. MCL 764.15(1)(d).

A peace officer who arrests an individual without a warrant must, without unnecessary delay, take the arrestee before a magistrate in the district where the offense occurred and present the magistrate with a complaint complying with MCR 6.101 stating the offense for which the individual was arrested. MCL 764.13.

MCL 764.9c addresses warrantless arrests for misdemeanors or ordinance violations punishable by not more than 93 days in jail and provides an alternative to formal arraignment:

> "(1) . . . if a police officer has arrested a person without a warrant for a misdemeanor or ordinance violation for which the maximum permissible penalty does not exceed 93 days in jail or a fine, or both, instead of taking the person before a magistrate and promptly filing a complaint as provided in section 13 of this chapter, the officer may issue to and serve upon the person an appearance ticket* as defined in section 9f of this chapter and release the person from custody."

*See Section 3.19(D) for more information about appearance tickets.

MCL 780.581 specifically addresses warrantless misdemeanor arrests:

> "(1) If a person is arrested without a warrant for a misdemeanor or a violation of a city, village, or township ordinance, and the misdemeanor or violation is punishable by imprisonment for not more than 1 year, or by a fine, or both, the officer making the arrest shall take, without unnecessary delay, the person arrested before the most convenient magistrate of the county in which the offense was committed to answer to the complaint."

Interim bail. "[I]f a magistrate is not available or immediate trial cannot be had," an individual arrested without a warrant for a misdemeanor offense or ordinance violation punishable by imprisonment for not more than one year may be entitled to post an interim bond with the arresting officer or other authorized officer. MCL 780.581(2). The bond amount may not exceed the

maximum possible fine for the offense but may not be less than 20 percent of the minimum possible fine for the offense. *Id*. For a more detailed discussion, see Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants—Third Edition* (MJI, 2006), Section 1.13, and Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings, 3d Edition* (MJI, 2004), Section 4.3.

3.7 "Without Unnecessary Delay"

The requirement that an accused be arraigned "without unnecessary delay" is more clearly quantified by case law involving defendants' challenges to the length of their post-arrest/pre-arraignment detention. In all "but the most extraordinary situations," an individual arrested without a warrant may not be detained for more than 48 hours without a judicial determination of probable cause. *People v Whitehead*, 238 Mich App 1, 4 (1999). Where there is no bona fide emergency to justify a lengthy detention and circumstances indicate that the detention was prolonged in an effort to obtain more evidence to support the accused's guilt, a person's constitutional right to be free of unreasonable seizure is implicated. *Id.* at 13. Therefore, statements made by an accused during a period of detention longer than 48 hours may not be admissible against the accused at trial. *Id*. at 4.

*See Criminal Procedure Monograph 6: *Pretrial Motions—Third Edition* (MJI, 2006), Sections 6.16–6.17.

A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56–57 (1991). Based on *Riverside*, the Court of Appeals found that a delay in excess of 80 hours was a presumptive violation of the Fourth Amendment protection against unreasonable seizure. *People v Manning*, 243 Mich App 615, 631 (2000). However, in the absence of police misconduct, such a lengthy delay did not automatically make involuntary any statements the defendant made during the extended detention. *Id.* at 644–645. Notwithstanding the unreasonableness of the seizure, the *Manning* Court concluded that the ultimate admissibility of a defendant's statement required a traditional inquiry into the statement's voluntariness. *Id.* at 645.* The *Manning* Court emphasized that even short delays could be unconstitutional if the delay was unreasonable under the circumstances presented. *Id.* at 630, citing *Riverside*, *supra*, 500 US at 56–57.

*As amended, effective January 1, 2006.

An accused who is not taken before a court for arraignment but has not yet been released must be arraigned without unnecessary delay through use of two-way interactive video technology authorized by MCR 6.006(A). MCR 6.104(A).*

3.8 Required Advice of Rights at Arraignments in District Court

When a defendant is arraigned in district court for an offense over which the district court has jurisdiction, the defendant must be given certain specific information. MCR 6.610(D)(1)* states:

*As amended, effective January 1, 2006.

> "(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction,* the defendant must be informed of
>
> > "(a) the name of the offense;
> >
> > "(b) the maximum sentence permitted by law; and
> >
> > "(c) the defendant's right
> >
> > > "(i) to the assistance of an attorney and to a trial;
> > >
> > > "(ii) (if subrule [D][2] applies)* to an appointed attorney; and
> > >
> > > "(iii) to a trial by jury, when required by law."

*See Section 3.2(A) for discussion of a district court's jurisdiction.

*MCR 6.610(D)(2) governs an indigent defendant's right to appointed counsel when a conviction could result in imprisonment.

This information may be given to the defendant in a writing made part of the file or by the court on the record. MCR 6.610(D)(1). See SCAO Form DC 213 (Advice of Rights). See also Sections 3.43, 3.44, and 3.48 for a checklist, a flowchart, and a script for conducting misdemeanor arraignments in district court.

3.9 Right To Counsel

A criminal defendant's right to the assistance of counsel is recognized in the federal and state constitutions and in a Michigan statute. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. However, there is no federal or state constitutional right to appointed counsel when a defendant is charged with a misdemeanor and no sentence of imprisonment is imposed. *People v Richert (After Remand)*, 216 Mich App 186, 192–194 (1996). MCR 6.610(D)(1)(c) requires the district court at arraignment to advise a defendant of his or her right to the assistance of counsel and to appointed counsel under certain circumstances.

An indigent defendant has the right to an appointed attorney whenever he or she is charged with an offense for which a minimum jail sentence is required on conviction, or whenever the court decides it might impose a jail sentence on the defendant, even if the sentence is suspended. MCR 6.610(D)(2).* See Section 3.10, below, for information on determining whether a defendant is indigent.

*As amended, effective January 1, 2006.

*As amended, effective January 1, 2006.

If the court determines it might impose a jail sentence or if a minimum sentence is required, an indigent defendant must be clearly informed of his or her right to the assistance of appointed counsel. An indigent defendant who is not represented by an attorney and who has not waived his or her right to an appointed attorney may not be sentenced to jail or to a suspended term of incarceration. MCR 6.610(D)(2).*

Waiver requirements. A defendant's right to the assistance of an attorney, to an appointed attorney, or to a jury trial is not waived unless:

- the defendant has been informed of the right, and
- the defendant waived the right in a writing* made part of the file or orally on the record.

*See SCAO Form MC 260 (Waiver/Jury Trial).

MCR 6.610(D)(3)(a)–(b).

*See Sections 3.24–3.33 for detailed discussion of pleas of guilty and nolo contendere.

Constitutionally infirm convictions may not be considered in subsequent prosecutions for enhancement purposes, but a valid waiver of a defendant's right to counsel need not be shown where no right to counsel existed in relation to the offense charged. *Richert*, *supra* at 195. In addition to other requirements,* before accepting a defendant's plea of guilty or no contest:

*As amended, effective January 1, 2006.

> "The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended." MCR 6.610(E)(2).*

*Effective January 1, 2006.

MCR 6.610(F)(2) addresses enhancement of a subsequent charge as it relates to a defendant's right to counsel for a previous conviction. MCR 6.610(F)(2)* states:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction."

*Effective January 1, 2006, the enhancement provision found in MCR 6.610 (E) is located in MCR 6.610(F).

MCR 6.610(E)* was amended after the Michigan Supreme Court's decision in *People v Reichenbach*, 459 Mich 109 (1998). In *Reichenbach*, the defendant asserted that his 1989 plea-based and counseless misdemeanor conviction could not be used to enhance a later conviction because he had neither been informed in 1989 of his right to *appointed* counsel nor had he waived his right to counsel before pleading guilty. *Id*. at 115. In deciding that the defendant's 1989 conviction was properly used to enhance a later charge

despite the absence of counsel, the Michigan Supreme Court adopted the United States Supreme Court's decisions in *Argersinger v Hamlin*, 407 US 25 (1972), and *Scott v Illinois*, 440 US 367 (1979).

Argersinger decided the fundamental principle that regardless of the severity of the offense charged, an individual could not be deprived of his or her liberty without having had the assistance of counsel. *Argersinger*, *supra* at 40. The *Argersinger* Court concluded that wherever "actual imprisonment" was the result, the defendant must receive the benefit of counsel. *Id*. The *Scott* Court affirmed *Argersinger's* "actual imprisonment" distinction and emphasized the difference between "actual imprisonment" and the "mere threat of imprisonment." *Scott*, *supra* at 373–374. The *Reichenbach* Court concluded:

> "The Michigan Constitution does not afford indigent misdemeanor defendants the right to appointed counsel absent 'actual imprisonment' under *Argersinger* and *Scott*." *Reichenbach*, *supra* at 118.

For purposes of the actual sentence imposed after an indigent defendant's conviction, the United States Supreme Court eliminated the significance of "actual imprisonment" versus "threatened" imprisonment. Following the Court's decision in *Alabama v Shelton*, 535 US 654 (2002), not only is an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel exempt from receiving a sentence of "actual imprisonment," a *probated* or *suspended* sentence of imprisonment is similarly invalid under the same circumstances.*

*Provisions addressing suspended sentences were added to MCR 6.610(D)(2) and (E)(2), effective January 1, 2006.

In *Shelton*, the United States Supreme Court implicitly disagreed with the Michigan Supreme Court's reasoning in *Reichenbach*. The Court affirmed the Alabama Supreme Court's conclusion (and the Alabama Court's explicit disagreement with *Reichenbach*) that no real distinction could exist between "actual imprisonment" and probated or "threatened" imprisonment for purposes of an indigent defendant's right to counsel. *Shelton, supra* at 659. Because an unrepresented indigent defendant who had not waived his or her right to counsel could not be made to serve any part of a "probated" or "suspended" sentence for the same reason that no term of "actual" imprisonment could be imposed, any distinction was illusory. *Id*. The United States Supreme Court held that a defendant has a constitutional right to counsel when he or she receives a probated or suspended sentence of imprisonment. *Id*. at 674.* In other words, an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment.

*Amendments to MCR 6.610(D)(2), effective January 1, 2006, incorporate the United States Supreme Court's holding in *Shelton*, *supra*.

3.10 Determining Whether a Defendant Is Indigent

Provided that the district's chief judge has so authorized, a district court magistrate may "[a]pprove and grant petitions for the appointment of an attorney to represent an indigent defendant accused of any misdemeanor

punishable by imprisonment for not more than 1 year or ordinance violation punishable by imprisonment." MCL 600.8513(2)(a).

*Effective January 1, 2006. Formerly MCR 6.610(G), to which the SCAO form still refers.

MCR 6.005(B) is not expressly included in MCR 6.001(B)'s description of the court rules governing matters of procedure in cases over which the district court has trial jurisdiction. Although not expressly directed toward arraignments for offenses cognizable in district court, a court may utilize MCR 6.005(B) to determine whether a defendant is entitled to appointed counsel on the basis of financial need. See SCAO Form MC 222 (Petition/ Order for Court Appointed Attorney). Notably, this form cites MCR 6.610(D)—a rule specifically applicable to *misdemeanor* cases in district court—and MCR 6.610(H)* and 6.005(B)—rules applicable to felony cases.

When a defendant requests the assistance of an attorney and claims he or she is financially unable to retain one, a determination of the defendant's indigence must be made. MCR 6.005(B). The court making this determination should consider the following factors:

- the defendant's present employment status, earning capacity, and living expenses;
- the defendant's outstanding debts and liabilities, secured and unsecured;
- whether the defendant qualifies for and receives public assistance;
- whether the defendant has available real or personal property that could be converted to cash without causing undue financial hardship to the defendant or the defendant's dependents; and
- any other circumstances that impair the defendant's ability to pay the fee ordinarily required to retain competent counsel.

MCR 6.005(B)(1)–(5).

A defendant's indigence must be determined based only on the *defendant's* financial resources, not the financial resources of the defendant's friends and family. *People v Arquette*, 202 Mich App 227, 230 (1993). In *Arquette*, the trial court erred in denying the defendant's counsel a transcript at public expense because the defendant's parents had retained the attorney. The Court of Appeals held that the defendant was indigent and remained so despite the parents' retention of the defendant's counsel. *Id*.

Similarly, a defendant's ability to post bond to gain pretrial release does not make the defendant ineligible for appointed counsel. MCR 6.005(B).

If the defendant is determined to be indigent. If the court finds the defendant indigent, an attorney must be promptly appointed and notified of his or her appointment. MCR 6.005(D). A defendant may be only partially indigent. If a defendant is determined to be only partially indigent, the court

may require the defendant to contribute to the costs of his or her defense. The court may establish a repayment plan and order the defendant's compliance with the plan. MCR 6.005(C). See SCAO Form DC 213 (Advice of Rights), which specifically addresses a defendant who has "been brought to court on a misdemeanor charge." The form later reads: "You may have to repay the expense of a court appointed attorney."

Where a defendant did not claim an inability to pay an attorney, the defendant was presumed able to reimburse the county for the costs of his appointed counsel. *People v Nowicki*, 213 Mich App 383, 386 n 1 (1995). Reimbursement is proper where repayment is not a condition of a defendant's representation or sentence. *Id.* at 388.

3.11 Appointment of Counsel When Two or More Defendants Are Jointly Charged

There is no provision in the court rules regarding the procedure to follow when two or more indigent defendants are jointly charged with the same *misdemeanor* offense over which the district court has jurisdiction, or when their cases are otherwise joined. However, the following rule provisions, applicable to the appointment of counsel in criminal cases cognizable in circuit court where there are multiple indigent defendants, may serve as guidance for similar misdemeanor situations.

MCR 6.005(F) states that "[w]hen two or more *indigent* defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court *must* appoint *separate* lawyers unassociated in the practice of law for each defendant." (Emphasis added.) That the court is not similarly required to advise defendants with *retained* counsel to obtain separate counsel does not violate the defendants' right to equal protection. *People v Portillo*, 241 Mich App 540, 542 (2000).

Pursuant to MCR 6.005(F)(1)–(3),

> "Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:
>
> > "(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

> "(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and
>
> "(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding."

MCR 6.005(G) addresses unanticipated conflicts of interest:

> "If, in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the court. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers. The court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require."

Where four brothers were codefendants involved in the same criminal offense, and the same attorney represented all four defendant-brothers in pleading guilty to the charged offense, the Court of Appeals found no evidence to support their claim that a conflict of interest deprived them of the effective assistance of counsel. *People v LaFay*, 182 Mich App 528, 530 (1990). The Court stated:

> "[R]epresentation of multiple codefendants by one attorney can lead to a conflict of interest serious enough to deprive any of them of effective assistance of counsel[, but s]uch a conflict is never presumed." *LaFay*, *supra* at 530.

3.12 Waiver of the Right To Counsel

MCR 6.610(D)(3) outlines the elements required for a valid waiver of a defendant's right to counsel:

> "(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant
>
> "(a) has been informed of the right; and
>
> "(b) has waived it in a writing* that is made a part of the file or orally on the record.

*See SCAO Form MC 260 (Waiver/Jury Trial).

MCR 6.005(D) and (E), applicable to procedural matters involving criminal offenses cognizable by circuit courts, provide additional guidance regarding a defendant's waiver of counsel. In part, MCR 6.005(D) states:

> "The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> > "(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
> >
> > "(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer."

Once a defendant has made an initial waiver of his or her right to the assistance of counsel, MCR 6.005(E) requires that

> "the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> > "(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > "(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one;* or
> >
> > "(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one."
>
> "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel."*

*Subject to MCR 6.610(D) (an indigent defendant's right to a court-appointed attorney in a misdemeanor case).

*MCR 6.005(E), as amended, effective January 1, 2006.

A defendant's refusal to cooperate with his appointed counsel and his unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in propria persona where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell*, 471 Mich 182, 184 (2004).

In *Russell*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. The court refused to appoint different counsel

unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "needed" to be provided with "competent counsel." *Russell, supra* at 184–187.

The *Russell* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set forth in *Faretta v California*, 422 US 806 (1975), and first adopted by the Michigan Supreme Court in *People v Anderson,* 398 Mich 361 (1976). *Russell*, *supra* at 190–192. Applying those requirements to the facts in *Russell*, the Court concluded:

> "In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.
>
> "While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel. Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.
>
> "We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with [*People v*] *Adkins* [*(After Remand)*, 452 Mich 702 (1996)] and United States Supreme Court precedent, courts *must* indulge every

> reasonable presumption against the waiver of the right to counsel." *Russell, supra* at 192–193 (footnotes omitted).

A defendant may make an unequivocal, knowing, intelligent, and voluntary waiver of his right to counsel even though the defendant's request to represent himself was prompted by his dissatisfaction with his counsel's cross-examination of two prosecution witnesses and the trial court denied the defendant's request to recall the witnesses so that he could question them. *People v Williams*, 470 Mich 634, 643–645 (2004).

During the trial in *Williams*, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-representation. The defendant then asserted that the witnesses' testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination testimony read at trial. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Williams, supra* at 637–639. According to the Court, "Defendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Id*. at 644.

The trial court further complied with the requirements of MCR 6.005 by establishing a record of the defendant's knowing, intelligent, and voluntary waiver of the right to counsel. The trial court determined that the defendant understood the charges against him, was aware of any mandatory minimum sentences associated with conviction of the charges, and knew of the maximum sentences possible for conviction of the charges. The trial court further advised the defendant of the risks involved in his decision to represent himself and again the defendant expressed an unequivocal desire to waive his right to counsel and proceed in propria persona. *Id*. at 645–647.

By order issued November 9, 2005, the Michigan Supreme Court reversed a Court of Appeals judgment (briefly discussed below) involving a defendant who was denied permission to represent himself at trial. *People v Chaaban (Chaaban I)*, ___ Mich ___ (2005). According to the Michigan Supreme Court, in violation of *Faretta v California*, 422 US 806 (1975), "[t]he trial court erroneously denied defendant's unequivocal request to represent himself[.]" *Chaaban I, supra* at ___.

In *People v Chaaban (Chaaban II)*, unpublished opinion per curiam of the Court of Appeals, decided March 29, 2005 (Docket No. 253513), the Court of Appeals concluded that the trial court did not err when it refused to permit the defendant to represent himself at trial. According to the Court of Appeals, it

was plain that "defendant's request to represent himself changed from unequivocal to equivocal after listening to the court's discussion about the risks of self-representation and its inquiry regarding [his] competence." *Chaaban II, supra* at ___.

Specifically, the Court of Appeals noted:

> "Defendant Chaaban went from certainty when he stated that he 'could defend [him]self with the truth' to a probability that he 'could probably effectively handle [him]self' during trial. Defendant Chaaban then finally concluded, at the close of the exchange with the trial court, '[w]ell, I don't know what to do." *Chaaban II, supra* at ___.

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, 267 Mich App 208, 220–23 (2005).

A defendant's waiver of counsel may be voluntary and unequivocal even when the defendant admitted "[he] would rather not represent [him]self" but decided to do so because *pro se* representation provided him with greater access to police reports and other information not otherwise available to him when he was represented by counsel. *Jones v Jamrog*, 414 F3d 585, 589 (CA 6, 2005).

> "In this case, [the defendant] considered his circumstances and decided that 'in his particular case counsel [was not] to his advantage.' *Faretta*, *supra*, at 835. In accordance with its discovery policy, the state refused to turn over police reports to him, instead providing them only to his attorney. [The defendant] was able to review the reports and discuss them with his attorney, but only when his attorney was available to do so and only for as long as the attorney had time. Consequently, the state's discovery policy presented [the defendant] with a real-world obstacle that he had no choice but to negotiate. The approach he selected was to forgo his right to counsel in order that he might have more time to review the police reports and do counter-investigative work in preparation for his defense at trial. The mere fact that this approach had an obvious and significant cost—the relinquishment of a lawyer's assistance—does not mean that [the defendant's] decision

to pursue the approach was involuntary." *Jones, supra* at 592.

3.13 Entering a Plea at Arraignment

Statutory law concerning arraignments for district court misdemeanors indicates that a defendant must enter a plea to the charge after the court has informed the defendant of the charge as it is stated in the warrant or complaint:

> "At the arraignment of an accused charged with a misdemeanor or an ordinance violation, the magistrate shall read to the accused the charge as stated in the warrant or complaint. The accused shall plead to the charge, and the plea shall be entered in the court's minutes." MCL 774.1a.

Language appearing in the court rules stops short of requiring a defendant to enter a plea at the arraignment. See MCR 6.610(D)(4). If a defendant refuses to plead to the charged offense, the magistrate must enter a plea of not guilty on the defendant's behalf. MCL 774.1a. See Sections 3.45–3.48 for a checklist, flowcharts, and a script for conducting misdemeanor arraignments and entering a defendant's plea to the offense charged.

3.14 Pretrial Release

A court may not deny pretrial release to a person charged with a misdemeanor. Const 1963, art 1, § 15; MCR 6.106(B). Unless an order has already entered, the court must determine the conditions of a defendant's release at the defendant's first appearance before a court. MCR 6.106(A). For persons charged with misdemeanors, the court must order the release of the defendant on personal recognizance or an unsecured appearance bond, or subject to a conditional release, with or without money bail (ten percent, cash, or surety). MCR 6.106(A)(2)–(3). See SCAO Forms MC 240 (Order/Pretrial Release) and MC 241 (Bond).

If the court is satisfied that a defendant's release on personal recognizance or unsecured appearance bond will reasonably ensure the defendant's appearance as required and will not present a danger to the public, a defendant's release is subject only to the defendant's agreement to appear as required, to remain in the state unless granted permission to leave, and to avoid committing any crimes while released. MCR 6.106(C).

If, however, a court determines that a defendant's pretrial release subject only to the requirements of MCR 6.106(C) is not sufficient to reasonably ensure the defendant's appearance as required or to reasonably ensure the public's safety, the court may order that the defendant's pretrial release be subject to the requirements contained in MCR 6.106(C) *and* any combination of

conditions contained in MCR 6.106(D)(2). MCR 6.106(D)(1)–(2). See Section 3.15, below, for discussion of these conditions.

In determining which release to use and what terms and conditions to impose on a defendant's release, a court must consider any relevant information, including:

> "(a) defendant's prior criminal record, including juvenile offenses;
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;
>
> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
>
> "(i) any other facts bearing on the risk of nonappearance or danger to the public." MCR 6.106(F)(1)(a)–(i).

*These conditions are listed in Section 3.15, below.

Court rule record requirement. If the court decides to release the defendant with money bail and one or more of the conditions contained in subrule (D),* a court must articulate for the record its reasoning for the decision. MCR 6.106(F)(2). It is not necessary for the court to make a finding on each factor listed in subrule (F)(1). MCR 6.106(F)(2).

Statutory record requirement. In contrast to the court rule (which lists nine factors to be considered but contains no mandate to record findings on all nine factors), statutory law expressly mandates that in setting a bail amount, the court consider *and make a finding on the record* with regard to each of the four factors listed in the statute. MCL 765.6(1) provides:

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

> "(a) The seriousness of the offense charged.
>
> "(b) The protection of the public.
>
> "(c) The previous criminal record and the dangerousness of the person accused.
>
> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

Note: Even though the court rule does not mandate that the court make and record its findings on each of the factors listed in MCR 6.106(F)(1), following the mandate found in the statute may minimize potential appellate problems.

MCL 765.6(2)* details the manner in which a person may post bail:

*Effective June 24, 2004.

> "If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court."

Review of the pretrial release decision. A party may seek review of a court's pretrial release decision by filing a motion (no fee required) in the court having appellate jurisdiction over the court from which the pretrial release decision issued. MCR 6.106(H)(1). Absent its finding an abuse of discretion, the reviewing court may not stay, vacate, modify, or reverse the lower court's pretrial release decision. *Id*.

3.15 Conditional Release

If the court determines that the terms of pretrial release outlined in MCR 6.106(C) are insufficient to guarantee the defendant's appearance as required or do not reasonably ensure the public's safety, the court may order the defendant's release subject to one or more conditions. MCR 6.106(D)(2) sets forth a nonexhaustive list of conditions that may be placed on a defendant's pretrial release. In addition to the conditions governing a defendant's release on recognizance or unsecured appearance bond (that the defendant will appear as required, will not leave the state, and will not commit any crime), MCR 6.106(D)(2) authorizes the trial court to make a defendant's release

> "(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to
>
> > "(a) make reports to a court agency as are specified by the court or the agency;

"(b) not use alcohol or illicitly use any controlled substance;

"(c) participate in a substance abuse testing or monitoring program;

"(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

"(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

"(f) surrender driver's license or passport;

"(g) comply with a specified curfew;

"(h) continue to seek employment;

"(i) continue or begin an educational program;

"(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

"(k) not possess a firearm or other dangerous weapon;

"(l) not enter specified premises or areas and not assault, beat, molest, or wound a named person or persons;

*Effective January 1, 2006.

"(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved.*

"(n) satisfy any injunctive order made a condition of release; or

"(o) comply with any other condition, including the requirement of money bail as described in subrule (E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

3.16 Release with Money Bail

The court may decide that the imposition of one or more of the conditions listed above is insufficient to assure the defendant's appearance or to protect the public's safety. In such cases, with or without any of the conditions included in subrule (D), the court may require money bail. If money bail is required, the court must state on the record the reasons it decided bail was necessary to guarantee the defendant's appearance or to preserve the public's safety. MCR 6.106(E).

When the court requires a defendant to post bond, the defendant has the option of posting a bond to be executed by a court-approved surety or by an unlicensed surety (including the defendant himself or herself), as long as the bond is secured in a manner approved by the court. Pursuant to MCR 6.106(E)(1),* a trial court may require the defendant to:

*As amended, effective January 1, 2006.

> "(a) post, at the defendant's option,
>
> > "(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or
> >
> > "(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
> >
> > > "[A] a cash deposit, or its equivalent, for the full bail amount, or
> > >
> > > "[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,
> > >
> > > "[C] designated real property; or
>
> "(b) post, at the defendant's option,
>
> > "(i) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or
> >
> > "(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
> >
> > > "[A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,
> > >
> > > "[B] designated real property."

If the court consents to the use of real property to secure a defendant's bond, the court may require the defendant to produce satisfactory proof of the property's value and the defendant's interest in it. MCR 6.106(E)(2).

*As amended, effective January 1, 2006.

Terminating a release order. When a defendant satisfies the conditions of his or her release and is discharged from all obligations in the case, the court must vacate the defendant's release order and discharge any person who has posted bail or bond. MCR 6.106(I)(1).* If cash or its equivalent was posted for the full amount of the defendant's bail, it must be returned. *Id*. If ten percent of the full bail amount was deposited, the court must return 90 percent of the deposited money and retain ten percent. *Id*.

3.17 Speedy Trial Requirement and Recognizance Release

*As amended, effective January 1, 2006.

A misdemeanor defendant must be released on personal recognizance if he or she has been incarcerated for a period of 28 days or more "to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode . . . unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community." MCR 6.004(C).* The 28-day period does not include:

> "(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,
>
> "(2) the period of delay during which the defendant is not competent to stand trial,
>
> "(3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,
>
> "(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either
>
> > "(a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or
> >
> > "(b) exceptional circumstances justifying the need for more time to prepare the state's case,
>
> "(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

> "(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion." MCR 6.004(C)(1)–(6).*

*As amended, effective January 1, 2006.

3.18 Raising the Issue of Mental Competency

"A claim of incompetency to stand trial, and the right to a competency determination, implicates constitutional due process protections." *In re Carey*, 241 Mich App 222, 225 (2000), citing *People v Newton (After Remand)*, 179 Mich App 484 (1989). MCR 6.001(B) expressly refers to MCR 6.125, the court rule governing mental competency hearings, as applicable to matters of procedure involving misdemeanor offenses cognizable in district court.

Statutory law presumes a defendant competent to stand trial. MCL 330.2020(1) provides:

> "A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial."

Except where otherwise noted, mental competency hearings are governed by MCL 333.2020 *et seq*. MCR 6.125(A). According to MCL 330.2024, "[t]he issue of incompetence to stand trial may be raised by the defense, court, or prosecution. The time and form of the procedure for raising the issue shall be provided by court rule."

A defendant's competence to stand trial may be questioned at any time during the proceedings against the defendant. MCR 6.125(B). The issue may be raised by any court before which proceedings are pending or are being held, including misdemeanor proceedings in district court. Even if the defendant does not raise the issue of competency, a trial court must *sua sponte* raise the issue whenever there exists a "bona fide doubt" about the defendant's competency. *People v Harris*, 185 Mich App 100, 102–103 (1990).

The issue of competency must be raised in writing, unless it is raised during the proceedings. MCR 6.125(B). If the issue of a defendant's competency to stand trial is first raised during the proceedings or at the defendant's trial, the court may adjourn the proceedings or, cognizant of any double jeopardy implications, the court may declare a mistrial. MCR 6.125(B).

*For a detailed discussion about determining an accused's mental competence, see Criminal Procedure Monograph 6: *Pretrial Motions—Third Edition* (MJI, 2006), Section 6.14.

Below is a summary of the process required when a defendant's mental competency is questioned.*

The mental competency examination. On a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other certified facility. MCR 6.125(C)(1); MCL 330.2026(1). See SCAO Form MC 204 (Order/Competency Examination). Once ordered, the examination must be performed, defense counsel must be consulted, and a written report must be submitted within 60 days. MCL 330.2028(1). While defense counsel must be consulted as part of the defendant's examination, consultation with the prosecution is optional. *Id*.

The court may order the defendant to undergo an independent examination related to the issue of competency if either party shows good cause for such an exam. MCR 6.125(D).

The examination report. The report submitted after the defendant's competency examination must contain the examiner's clinical findings, reasonable detail of the facts on which the clinical findings are based, and the examiner's opinion regarding the issue of the defendant's competence. MCL 330.2028(2)(a)–(c). If the examiner concludes that the defendant is incompetent to stand trial, the examiner must report his or her opinion about the likelihood of prescribing a course of treatment by which the defendant could attain competence within the statutory time permitted. MCL 330.2028(2)(d).

Judicial determination of competency at hearing. "A competency hearing must be held within 5 days of receipt of the report required by MCL 330.2028 [parallel citation omitted] or on conclusion of the proceedings then before the court, whichever is sooner, unless the court, on a showing of good cause, grants an adjournment." MCR 6.125(E). See SCAO Form MC 205 (Finding/ Order on Competency).

When the defendant is incompetent. A motion made while a defendant is incompetent must be heard and decided if the defendant's presence is not essential to a fair hearing and decision on the motion. MCR 6.125(F)(1). Specifically, testimony on a pretrial defense motion may be taken without the defendant's presence if the defendant could not have assisted with the defense. MCR 6.125(F)(2).

Competency and medication. A court may not determine that a defendant is incompetent to stand trial simply because the defendant "might be" incompetent if he or she was not receiving psychotropic or other medication. MCL 330.2020(2). The court may require the defendant's treating physician to file a statement attesting that the medication would not adversely affect the defendant's understanding of the proceedings or the defendant's ability to assist with the defense before the court determines whether the defendant is

competent to stand trial. *Id*. See *People v Mette*, 243 Mich App 318, 331–332 (2000).

If, after the court's receipt of the examination report and a hearing based on the report, the court determines that a defendant who is receiving medication is not incompetent to stand trial, the court may order the continued administration of medication as appropriate to the pending proceedings and throughout the trial. MCL 330.2030(4).

3.19 Misdemeanor Traffic Violations and Appearance Tickets

A. Beginning a Misdemeanor Traffic Case

A misdemeanor traffic case begins in one of three ways:

- when a law enforcement officer serves an individual with a written citation for a traffic violation and the citation is filed in district court, MCR 6.615(A)(1)(a);
- when a sworn complaint is filed in district court and an arrest warrant is issued, MCR 6.615(A)(1)(b); or
- when other special procedures authorized by statute are taken,* MCR 6.615(A)(1)(c).

*Procedures for citing out-of-state motorists, for example. See *Traffic Benchbook, Volume 1—Third Edition* (MJI, 2005), for more information.

A written citation is a summons that commands the offender's initial appearance in court to respond to the violation alleged by the citation. MCR 6.615(A)(2)(a)–(b). A single citation may serve as a sworn complaint and as the basis for a misdemeanor warrant. MCR 6.615(A)(1)(b).

A misdemeanor offense and a civil infraction both may be alleged in a single citation. MCR 6.615(A).*

*Effective January 1, 2006, the prohibition against alleging both a misdemeanor and a civil infraction in a single citation was eliminated.

B. Arraignment on a Misdemeanor Traffic Citation

*See *Traffic Benchbook, Volume 3—Third Edition* (MJI, 2005) for detailed information on these offenses.

A person arrested for a misdemeanor violation of MCL 257.625(1) (operating while intoxicated), MCL 257.625(3) (operating while visibly impaired), MCL 257.625(6) (zero tolerance/minor operation), MCL 257.625(7) (OUIL with a minor in the vehicle), or MCL 257.625(8) (operating with the presence of drugs) or MCL 257.625m (OUIL/commercial vehicle) (or for a violation of a local ordinance substantially corresponding to MCL 257.625(1), (3), (6), or (8) or MCL 257.625m),* must be arraigned on the citation, complaint, or warrant within 14 days of the arrest or service of the warrant. MCL 257.625b(1).

A district court magistrate may conduct arraignments on misdemeanor traffic violations if the magistrate is so authorized by statute and by the judges of the district. MCR 6.615(C).

The consequences for a defendant who fails to appear as required or to otherwise respond appropriately to any matter pending as a result of the misdemeanor traffic citation are expressly detailed in MCR 6.615(B). If the individual who failed to appear is a Michigan resident, the court

*Process of suspending driver's license.

*As amended, effective January 1, 2006.

> "(a) *must* initiate the procedures required by MCL 257.321a* for the failure to answer a citation; and
>
> "(b) *may* issue a warrant for the defendant's arrest." MCR 6.615(B)(1)(a)–(b).* (Emphasis added.)
>
> **Note:** An arrest warrant may issue without regard to whether a sworn complaint is filed with the court. MCR 6.615(B)(1)(b).

If the individual who failed to appear is not a Michigan resident, the court may take one or more of the following actions:

*As amended, effective January 1, 2006.

> "(a) the court may mail a notice to appear to the defendant at the address in the citation;
>
> "(b) the court may issue a warrant for the defendant's arrest; and
>
> "(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date." MCR 6.615(B)(2)(a)–(c).*
>
> **Note:** An arrest warrant may issue without regard to whether a sworn complaint is filed with the court. MCR 6.615(B)(2)(b).

Failure to appear as required to answer for a violation reportable to the Secretary of State under MCL 257.732 is a misdemeanor offense punishable by not more than 93 days' imprisonment, a $100.00 fine, or both. MCL 257.321a(1).

C. Conducting Hearings on Contested Cases

A court may not hear a contested case until a citation has been filed with the court. MCR 6.615(D)(1). Even when a citation is filed electronically, the court has discretion whether to hear the case or to decline hearing it until the citation is signed by the issuing officer and filed on paper. *Id*. If a court requires a signed paper version of the citation to be filed and that action is not taken, the case "may be dismissed with prejudice." MCR 6.615(D)(1).*

*As amended, effective January 1, 2006, dismissal of the case is discretionary rather than mandatory.

A misdemeanor traffic case must be conducted according to the constitutional and statutory procedures and safeguards applicable to misdemeanor offenses cognizable by the district court. MCR 6.615(D)(2).

D. Appearance Tickets

When a police officer makes a warrantless arrest for a misdemeanor or ordinance violation punishable by a maximum of 93 days in jail, a fine, or both, the officer may, instead of bringing the accused before a magistrate and promptly filing a complaint, issue and serve on the offender an appearance ticket, and release the person from custody. MCL 764.9c(1).*

*For a more detailed discussion of appearance tickets, see Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants—Third Edition* (MJI, 2006), Section 1.4(A).

No sworn complaint is necessary for the magistrate's acceptance of an accused's plea on an appearance ticket issued under MCL 764.9c. MCL 764.9g(1). If, however, the accused pleads not guilty to the offense charged in the appearance ticket, a sworn complaint must be filed with the magistrate to proceed with prosecuting the offender. *Id*. No arrest warrant may issue for an offense listed on an appearance ticket until a sworn complaint is filed. *Id*.

Similarly, a peace officer may issue a written citation to a person arrested without a warrant for most misdemeanor traffic offenses. See MCR 6.615(A)(1)(a) and MCL 257.728(1). If the officer issues a citation for a misdemeanor punishable by imprisonment for not more than 90 days, a magistrate may accept the accused's plea of guilty without the filing of a sworn complaint. MCL 257.728e. However, if the accused pleads not guilty, a sworn complaint must be filed with the magistrate. *Id*.*

*See Criminal Procedure Monograph 1, Section 1.4(B) for further discussion.

A district court magistrate may accept an accused's guilty plea without requiring that a sworn complaint be filed when the offense charged falls within the district court magistrate's authority under MCL 600.8511. MCL 764.9g(2).*

*See Section 3.3 for discussion of a district court magistrate's authority.

3.20 Violations of the Marine Safety Act

*See Sections 6.3 and 6.4 in *Traffic Benchbook, Volume 2—Third Edition* (MJI, 2005), for more information.

Unless otherwise indicated, a violation of the Marine Safety Act (MSA),* MCL 324.80101 *et seq*., is a misdemeanor. MCL 324.80171. A peace officer who observes a violation of the MSA may immediately arrest the violator without a warrant, or the officer may issue the person a written or verbal warning. MCL 324.80166(4). An officer with reasonable cause to believe that an individual was operating a vessel while under the influence of alcohol or drugs at the time of his or her involvement in an accident, MCL 324.80176, may arrest that individual without a warrant. MCL 324.80180.

A. Arraignment After a Warrantless Arrest

If an officer arrests an individual without a warrant for certain MSA violations (listed below), the individual must be arraigned without unreasonable delay by a magistrate or judge who

- is within the county where the offense allegedly occurred,
- has jurisdiction of the offense, and
- is nearest or most accessible with reference to the place where the arrest was made.

MCL 324.80167.

Pursuant to MCL 324.80167, MSA offenses requiring immediate arraignment when the offender is arrested without a warrant are:

- negligent homicide;
- violations of MCL 324.80176(1), (3), (4), or (5), or violations of local ordinances substantially corresponding to those provisions; or

  MCL 324.80176 prohibits the operation of a vessel while under the influence of intoxicating liquor or a controlled substance. Specifically, subsection (1) addresses OUIL, subsection (3) addresses visible impairment, subsection (4) discusses OUIL resulting in death, and subsection (5) discusses OUIL causing serious impairment of a body function.

- violations of MCL 324.80147 or violations of a local ordinance substantially corresponding to MCL 324.80147. The arresting officer may issue a written notice to appear in court for a violation of MCL 324.80147 if it does not appear that releasing the offender pending the issuance of a warrant would constitute a public menace.

  MCL 324.80147 prohibits the careless and reckless operation of a vessel in disregard of the rights or safety of

> others, without the exercise of due caution and circumspection, or at a speed or in a manner that endangers or is likely to endanger a person or property.

B. Written Notice To Appear After a Warrantless Arrest

If an individual is arrested without a warrant under conditions not referred to in MCL 324.80167, immediate arraignment is not required, and the arresting officer must prepare in duplicate a written notice directing the offender to appear in court. The notice must contain the name and address of the offender, the name of the offense charged, and the time and place the person must appear in court. If the arrested person demands arraignment before a magistrate or district court judge, the arresting officer must take the actions outlined in MCL 324.80167* in lieu of issuing the offender a written notice to appear in court. MCL 324.80168(1).

*See subsection (A), above.

Timing of appearance required by written notice. Unless the arrestee demands an earlier hearing, the time listed in a written notice to appear must be within a reasonable time after the arrest. MCL 324.80168(2).

Place of appearance. The place specified in the notice to appear must be before a magistrate or district court judge with jurisdiction of the offense and within the township or county in which the charged offense allegedly occurred. MCL 324.80168(3).

Methods of appearance. The person to whom a written notice to appear is issued may make appearance in person, by representation, or by mail. When an individual appears by representation or by mail, the magistrate or district judge may accept a plea of guilty or not guilty for purposes of arraignment just as if the offender had personally appeared before the court. The magistrate or district judge may require a person's appearance before the court by giving the person five days' notice of the time and place of his or her required appearance. MCL 324.80168(4).

3.21 A Crime Victim's Rights Following an Arraignment

Article 3 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., assigns certain rights and responsibilities to victims of "serious misdemeanors."* "Serious misdemeanors" are listed by MCL 780.811(1)(a):

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

- assault and battery, including domestic assault and battery, MCL 750.81;
- assault and battery causing serious injury, MCL 750.81a;
- breaking and entering or illegal entry, MCL 750.115;
- fourth-degree child abuse, MCL 750.136b;

- contributing to the delinquency of a minor, MCL 750.145;
- enticing a minor for immoral purposes, MCL 750.145a;
- using the internet or a computer to make a prohibited communication, MCL 750.145d;
- intentionally aiming a firearm without malice, MCL 750.233;
- discharging a firearm intentionally aimed at a person without causing injury, MCL 750.234;
- discharging a firearm intentionally aimed at a person and resulting in injury, MCL 750.235;
- indecent exposure; MCL 750.335a;
- stalking, MCL 750.411h;
- injuring a worker in a work zone, MCL 257.601b(2);
- leaving the scene of a personal injury accident, MCL 257.617a;
- OUIL/UBAC of a motor vehicle if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual, MCL 257.625;
- OUIL/UBAC of a vessel if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual, MCL 324.80176(1) or (3);
- selling or furnishing alcohol to a minor if the violation results in physical injury or death, MCL 436.1701;
- violation of a local ordinance substantially corresponding to one of the offenses above; and
- a charged felony or serious misdemeanor that is subsequently reduced or pleaded to a misdemeanor.

Although many provisions of Article 3 of the CVRA deal with a law enforcement agency's or prosecuting attorney's obligations, the court may find it helpful to be cognizant of the following sections of the CVRA as early as the arraignment.

Identifying information about a crime victim must be contained in a separate statement. An officer investigating a serious misdemeanor involving one or more victims must file with the complaint, appearance ticket, or traffic citation a separate written statement containing the name, address, and telephone number of each victim. MCL 780.812. Victim information is not a matter of public record, and statutory law exempts it from disclosure under the freedom of information act. MCL 780.830.

Notice required when the defendant pleads guilty or no contest to a serious misdemeanor. Within 48 hours of accepting a defendant's guilty or no contest plea to a serious misdemeanor, the court must notify the prosecuting attorney of the plea and the date scheduled for sentencing. MCL 780.816(1). The notice must include the name, address, and telephone number of the victim.

Notice required when no plea to a serious misdemeanor is accepted. Even when no plea is accepted at the arraignment and further proceedings are expected, the court must notify the prosecuting attorney of that fact within 48 hours of the arraignment. MCL 780.816(1).

Prosecutor's obligation to notify the crime victim. Within 48 hours after receiving notice from the court that at arraignment, a defendant pleaded guilty or no contest to a serious misdemeanor, or that no plea was accepted, the prosecutor must give the crime victim written notice of the statutory rights specified in MCL 780.816(1)(a)–(f).

Victim impact statements. The court may order the preparation of a presentence investigation report (PSIR) in any criminal misdemeanor case.* MCL 771.14(1). If a crime victim requests, a written impact statement must be included in the PSIR if one is prepared. MCL 771.14(2)(b). In juvenile delinquency, designated, and serious misdemeanor cases, the victim also has the right to submit an oral or written impact statement if a disposition or presentence investigation report is prepared. MCL 780.792(1) and (3); MCL 780.824. If no PSIR is prepared in a "serious misdemeanor" or designated case involving a misdemeanor, the court must "notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the sentencing," and the victim may submit a written impact statement to the prosecutor or court. MCL 780.792(2); MCL 780.825.

*PSIRs are required in all felony cases. See Hummel, Criminal Procedure Monograph 8: *Felony Sentencing* (MJI, 2005), Section 8.4, for more information on PSIRs.

Statutory law authorizes circuit and district courts to institute or adopt a drug treatment court.* MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). If an offender is admitted to a drug treatment court, adjudication of his or her crime may be deferred. MCL 600.1070(1)(a)–(c). A crime victim and others must be permitted to submit a written statement to the court prior to an offender's admission to drug treatment court. MCL 600.1068(4) provides:

*2004 PA 224, effective January 1, 2005.

> "In addition to rights accorded a victim under the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, the drug treatment court must permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."

Restitution is required of any defendant convicted of a misdemeanor punishable by not more than one year. Full restitution is not limited to serious misdemeanor convictions. At sentencing for a misdemeanor punishable by imprisonment for one year or less, the court must order the defendant to make full restitution to "any victim of the defendant's course of conduct that gives rise to the conviction." MCL 780.826(2).

Part B—Commentary on Pleas

A person accused of an offense cannot be convicted of the offense unless he or she is found guilty of the charge by a judge or jury, or unless he or she confesses guilt for the offense or admits to the truth of the charge. MCL 763.2. A defendant charged with a misdemeanor offense cognizable in district court may stand mute or plead not guilty, guilty, or nolo contendere. These plea alternatives and their applicability to offenses over which the district court has jurisdiction are discussed in detail in the sections below.

See Part C—Reference Material for the following resources: Section 3.45 contains a checklist of requirements for plea proceedings involving guilty and no contest pleas; Section 3.46 contains a flowchart for guilty and no contest pleas; Section 3.47 contains a flowchart for not guilty pleas; and Section 3.48 contains a script for conducting misdemeanor arraignments and plea proceedings in district court.

3.22 Applicable Court Rules

Subchapter 6.600, the section devoted to criminal procedure in district court, contains all the information *expressly* applicable to plea proceedings in district court for offenses over which the district court has trial jurisdiction. Subchapter MCR 6.300 (Pleas) contains detailed information about the kinds of pleas available to defendants charged with criminal offenses cognizable by circuit courts. MCR 6.001(A). MCR 6.001(B) does not include subchapter 6.300 in its list of court rules applicable to misdemeanor plea proceedings in district court. However, provisions contained in subchapter 6.300 pertaining to plea proceedings involving offenses cognizable in circuit court may be instructive whenever MCR 6.610 does not supply a rule specific to plea proceedings involving offenses cognizable in district court.

3.23 Record Requirements for Plea Proceedings

Except when a writing is permitted by law or by court rule, a verbatim record of plea proceedings in district court is required. MCR 6.610(C). When a record of district court proceedings is required, the proceedings must be taken by the district court reporter or recorded using a recording device approved by the state court administrator. MCL 600.8331; MCL 600.8611.

A. Standing Mute or Pleading Not Guilty

Statutory law concerning misdemeanor arraignments indicates that a defendant *must* enter a plea to the charge after the court has informed the defendant of the charge as it is stated in the warrant or complaint. MCL 774.1a. No language in the court rule requires a defendant to enter a plea at the arraignment. See MCR 6.610(D)(4). Language in MCR 6.301(A), a rule

applicable to felony pleas, instructs the court to enter a plea of not guilty on behalf of a defendant who refuses to plead to the charged offense. Similar language appears in MCL 774.1a. Where a plea of not guilty is entered, "every material allegation in the information [is placed in issue] and [] the defendant [is permitted] to raise any defense not otherwise waived." MCR 6.301(A).

With the court's permission, a defendant may stand mute or plead not guilty without a "formal" or "in-court" arraignment by filing a written statement signed by the defendant and any defense attorney of record. MCR 6.610(D)(4) states:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

B. Plea Agreements and "Sentence Bargains"

MCR 6.610(E)(5) requires district courts to place plea agreements on the record:

> "The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject, or indicate on what basis it accepts the plea."

Where all the terms of a plea agreement are not placed on the record, the trial court and the parties have not fully complied with the rule requirements, which are designed to safeguard the rights of the defendant and the prosecution if enforcement of the plea agreement becomes an issue. In *People v Hannold*, 217 Mich App 382 (1996), details of the defendant's agreement to testify against another individual in exchange for a specific sentencing consideration were not included on the record made of the defendant's plea proceeding; instead, details of the agreement were contained in a sealed document on file with the court. When the defendant failed to provide the promised testimony, the court vacated his plea to a lesser charge, and he was convicted of the original, and more serious, controlled substance charge. *Id.* at 383–386. Although the Court of Appeals concluded that the parties' failure to comply with the rule requirements was harmless error, the Court was unequivocal in its disapproval of such conduct:

> "This was error. We take this opportunity to emphasize that we do not condone such agreements or procedure and in fact strongly

disapprove of plea agreements not fully and openly set forth on the record." *Id*. at 387.

"Sentence bargains." A defendant may agree with the prosecuting attorney to plead guilty to an offense in exchange for a specific sentence (a "sentence agreement") or a prosecutorial sentence recommendation, but a trial judge may not reach an agreement with the defendant over the prosecutor's objection. *People v Cobbs*, 443 Mich 276, 281–283 (1993). A trial court's role in the sentence bargain process is limited to the approval or rejection of any sentence agreement reached by the defendant and the prosecutor or, at the request of either party, to estimate for the record the sentence the court would impose for conviction of the charged offense based on the information then available.* *Id*.

*See Section 3.29 for more information on the trial court's role in the bargaining process.

MCR 6.302(C)(3), a rule expressly applicable to procedural matters involving circuit court offenses, contains additional information regarding "sentence bargains" that may also be helpful in making a record of plea proceedings in district court. MCR 6.302(C)(3) states:

> "(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
>
> > "(a) reject the agreement;* or
> >
> > "(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
> >
> > "(c) accept the agreement without having considered the presentence report; or
> >
> > "(d) take the plea under advisement.
>
> "If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement."*

*See Section 3.35 for information about a trial court's rejection of a plea or plea agreement.

*See Section 3.38 for discussion of plea withdrawal.

3.24 Guilty Pleas

A guilty plea is a conclusive conviction equivalent to a jury's guilty verdict. *People v Ginther*, 390 Mich 436, 440 (1972). A defendant's decision to plead guilty is the most serious step a defendant can take in his or her criminal prosecution. *People v Thew*, 201 Mich App 78, 95 (1993). Precisely because

a guilty plea is the most serious aspect of a defendant's criminal case, a guilty plea must be a voluntary, knowing, and intelligent admission made with an adequate awareness of important circumstances and likely consequences. *Thew*, *supra* at 95, citing *Brady v United States*, 397 US 742, 747–748 (1970).

*See Section 3.25, below, for discussion of no contest pleas.

The court rules expressly applicable to procedural matters involving criminal offenses cognizable in district court and those offenses cognizable in circuit court each contain provisions concerning guilty pleas. MCR 6.610(E) outlines the required procedure by which a district court may accept a defendant's plea of guilty or nolo contendere.* MCR 6.302 outlines the same procedure, albeit with more detail, for accepting a defendant's plea of guilty or no contest to a charged offense cognizable in circuit court. See Sections 3.45, 3.46, and 3.48 for reference material in conducting plea proceedings involving guilty and no contest pleas.

*As amended, effective January 1, 2006.

Criminal offenses over which the district court has jurisdiction. Pursuant to MCR 6.610(E),* before a court may accept a defendant's plea of guilty or nolo contendere "the court shall in all cases comply with this rule." MCR 6.610(E) further provides:

> "(1) The court shall determine that the plea is understanding, voluntary, and accurate."*

*See Sections 3.30 and 3.31 for detailed discussion of these factors.

To determine the accuracy of a defendant's guilty plea, the rule requires that the court question the defendant to "establish support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading[.]" MCR 6.610(E)(1)(a). When a defendant pleads no contest, the court must not question the defendant about his or her participation in the crime but must use other available information to establish the accuracy of the defendant's plea. MCR 6.610(E)(1)(b).

MCR 6.302 describes a detailed process by which the circuit court is to determine whether a plea is understanding, voluntary, and accurate. See MCR 6.302(B), (C), and (D).

*See Part A, Section 3.18, for more information on determining a defendant's competence.

Competency requirements. An incompetent defendant* cannot tender a valid guilty plea. *People v Kline*, 113 Mich App 733, 738 (1982). When a defendant offers to plead to the crime charged and significant record evidence suggests that the defendant is possibly incompetent, a trial court is obligated to make a separate finding with regard to competency before addressing the defendant's plea. *People v Whyte*, 165 Mich App 409, 414 (1988).

3.25 Nolo Contendere (No Contest) Pleas

A no contest plea is generally recognized as an alternative to a guilty plea. See MCR 6.610(E)(1)(b). A plea of no contest to a felony offense requires the court's consent. MCR 6.301(B).

A no contest plea prevents the court from eliciting a defendant's admission of guilt, but the result of the defendant's plea not to contest the charges against him or her is the same as if the defendant had admitted guilt. If a defendant pleads no contest to a charged offense, with the exception of questioning the defendant about his or her role in the charged offense, the court shall proceed in the same manner as if the defendant had pleaded guilty. MCL 767.37. See Sections 3.45, 3.46, and 3.48 for reference guides involving no contest pleas in district court.

A court's acceptance of a no contest plea and the limits such a plea places on questioning a defendant about the crime may be justified by circumstances surrounding the offense and the offender. A nonexhaustive list of reasons that might justify a court's acceptance of a no contest plea is found in *Guilty Plea Cases*, 395 Mich 96, 134 (1975). No contest pleas may be appropriate when the defendant is reluctant to describe the details of an especially sordid crime, the defendant cannot clearly recall the circumstances of the crime because he or she was intoxicated, the defendant has committed numerous crimes similar to the one charged and is unable to distinguish one from the others, or the defendant wishes to escape civil liabilities made possible by a guilty plea or trial conviction. *Id*.

Similarities between guilty pleas and no contest pleas. A no contest plea has virtually the same effect as a guilty plea. The procedures for accepting and recording the pleas are similar, the defendant may receive the same sentence for a conviction without regard to the type of plea on which the conviction is based, and the conviction resulting from either plea is final.

The disposition following a no contest plea is a conviction with the same legal consequences as a guilty plea for purposes of other criminal proceedings. For example, a conviction obtained from a no contest plea may be used as a previous conviction for purposes of calculating multiple or habitual offender penalty provisions. Likewise, the prohibition against double jeopardy would prevent future prosecutions for the same offense when a conviction is obtained as the result of a defendant's no contest plea.*

*See LaFave, Israel, and King, *Criminal Procedure*, *Second Edition*, vol. 5, §21.4(a), pp 152–154 (1999).

Effect of no contest plea on future civil litigation based on criminal conviction. A defendant's no contest plea to criminal charges does not estop that defendant from denying responsibility in a later civil action arising from the same conduct. *Lichon v American Universal Ins Co*, 435 Mich 408, 417 (1990).

3.26 Required Advice of Rights at Plea Proceedings

MCR 6.610(E)(1)–(9) govern plea proceedings when the charged offense is cognizable in district court. This section discusses in detail a district court's obligations when a defendant pleads guilty or no contest to an offense over which the district court has jurisdiction.

See Part C—Reference Material for the following resources: Section 3.45 contains a checklist of requirements for proceedings in district court involving guilty and no contest pleas; Section 3.46 is a flowchart representing the guilty/no contest plea process; and Section 3.48 is a script for conducting misdemeanor arraignments and plea proceedings in district court.

A. "Grouping of Rights"

*See Section 3.31 for detailed discussion of the requirement that a plea is "understood."

A guilty plea cannot be "understandingly" made unless the defendant has knowledge of the consequences of his or plea.* Automatic reversal is mandated where the record does not affirmatively show that before pleading guilty, a defendant was advised that his or her guilty plea waived a trio of constitutional rights known as the *Boykin-Jaworski* rights. *Boykin v Alabama*, 395 US 238, 279–280 (1969), and *People v Jaworski*, 387 Mich 21, 27 (1972).

The three constitutional rights waived by a defendant's guilty plea are:

- the right to a trial by jury,
- the right to confront one's accusers, and
- the privilege against self-incrimination.

Boykin, supra at 279; *Jaworski, supra* at 30.

*As amended, effective January 1, 2006.

MCR 6.610(E)(3)(b)* requires a court to advise a defendant of the trial rights that are waived by a guilty or no contest plea. MCR 6.610(E)(3) states:

> "(3) The court shall advise the defendant of the following:
>
> * * *
>
> > "(b) that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:
> >
> > > "(i) the right to have witnesses called for the defendant's defense at trial,
> > >
> > > "(ii) the right to cross-examine all witnesses called against the defendant,
> > >
> > > "(iii) the right to testify or to remain silent without an inference being drawn from said silence,
> > >
> > > "(iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt."

The Michigan Supreme Court specifically approved of a trial court's "grouping" of a defendant's rights in the court's recital of rights to a

defendant. *Guilty Plea Cases*, 395 Mich 96, 114–115 (1975). Provided that the record at a plea proceeding reflects that none of the three *Boykin-Jaworski* rights was omitted, reversal is not necessarily required where each right is not explained separately or is "imprecise[ly] recit[ed]." *Guilty Plea Cases, supra* at 122.

B. Method of Recital

According to MCR 6.610(E)(4),* a defendant or defendants may be informed of the trial rights in MCR 6.610(E)(3)(b) as follows:

*As amended, effective January 1, 2006.

> "(a) on the record,
>
> "(b) in a writing made part of the file, or
>
> "(c) in a writing referred to on the record.
>
> "If the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights."

The trial court must assume the principal burden of advising the defendant of the required information before accepting a plea. The purpose of requiring the trial court to personally address the defendant is to enable the court "to observe [the defendant's] demeanor and responses" to the information as he or she receives it, but the information conveyed to the defendant may come from sources other than the court. *Guilty Plea Cases*, *supra* at 114. According to the Michigan Supreme Court:

> "A guilty plea conviction will not be reversed if the judge engages in the required colloquy but fails to mention an item which the record shows was established through, for example, an opening statement of or interjection by the prosecutor or defense counsel in the hearing of the judge and defendant." *Id*. at 114–115.

The Court of Appeals affirmed a defendant's conviction of OUIL-3rd after finding that the defendant failed to establish that his earlier plea-based conviction (his second OUIL conviction, which served as the basis for his OUIL-3rd) was invalid because the trial court had not informed the defendant of his right to a trial by jury. *People v Harris*, 191 Mich App 422, 425 (1991). In *Harris*, the Court found that the defendant had been provided with written information about the rights to which he was entitled, and the written advice of rights complied with MCR 6.610(4)(b), which allows a defendant to be informed of his or her trial rights in writing. The Court further noted that the defendant failed to produce any evidence that the written advice of rights he signed violated the standard set forth in the court rule. *Harris*, *supra* at 425.

Note: The Editorial Advisory Committee emphasized the importance of obtaining an oral statement and waiver from a defendant who was advised of his or her trial rights in writing. Because some English-speaking defendants are functionally illiterate, it is imperative that the court determine that a defendant has indeed read and understood rights provided to him or her in writing. In addition to the English language, SCAO Form DC 213 (Advice of Rights) is available in Spanish, Arabic, Chinese, Hmong, Korean, and Russian versions.

C. Substantial Compliance with Rule Requirements

*Equivalent provisions pertaining to criminal procedure in district court are found in MCR 6.610(E)(3)(b).

The Michigan Supreme Court concluded that automatic reversal was not required when a trial court fails to advise a defendant at a plea proceeding that the defendant's tender of a guilty plea waived the presumption of innocence and the right to trial, where the court did so advise the defendant at an earlier stage of the proceedings. *People v Saffold*, 465 Mich 268, 275–276 (2001). The Court noted that although the trial court had not strictly complied with the requirements of MCR 6.302(B)(3),* there existed substantial compliance with the rule sufficient to have alerted the defendant to the fact that a guilty plea waived the defendant's right to trial and the rights attending to a trial. *Id*. at 271. The Court specifically ruled that it was not necessary that a defendant be advised of the individual trial rights waived by his or her guilty plea, as long as the record showed that the defendant was informed that his or her guilty plea waived the defendant's general right to trial. *Id*. at 273–274.

D. Repeating the Required Advice of Rights at Subsequent Proceedings

*See Part A, Section 3.12 for the text of MCR 6.005(E).

If the defendant previously waived the assistance of counsel, MCR 6.005(E)* (applicable to matters of procedure involving felony offenses but not expressly applicable to procedural matters involving offenses cognizable in district court) mandates that the court advise the defendant of his or her continuing right to an attorney's assistance and obtain the defendant's continued waiver of that right before beginning any court proceeding following the defendant's initial waiver. Substantial compliance with the mandates contained in MCR 6.005(E)(1)–(3) is required. *People v Russell*, 471 Mich 182, 191 (2004).

*See Section 3.27, below, for discussion of a defendant's right to counsel.

Although no rule similar to MCR 6.005(E) expressly applies to waivers when the offense is *not* cognizable in circuit court, making a record of a defendant's waiver of counsel at the beginning of each proceeding in district court may minimize appellate problems related to a defendant's right to counsel.*

Where a defendant is fully advised of his *Boykin-Jaworski* rights at a proceeding prior to the proceeding at which the defendant's guilty plea is accepted, the court's failure to repeat the rights at the plea proceeding did not necessarily invalidate the defendant's guilty plea. *People v Kosecki*, 73 Mich App 293 (1977). In *Kosecki*, the Court of Appeals affirmed the defendant's

plea-based conviction when the record showed that the defendant was fully advised of his rights at the time he entered his plea. Two weeks later, at the defendant's sentencing hearing, the court permitted the defendant to withdraw his guilty plea. Later the same day, the defendant retendered, and the court accepted, his guilty plea. *Id*. at 297–298. The Court explained:

> "When a plea is withdrawn on the day of sentencing, for a reason that does not indicate that defendant pled in ignorance of his *Jaworski* rights, and retendered the same day, it is not absolutely necessary that the subsequent plea be preceded by a recital of the *Jaworski* rights." *Id*. at 298.

3.27 Advice About the Right To Counsel

A defendant has a constitutional right to counsel at plea proceedings* as well as at trial proceedings. Consequently, an indigent defendant has the right to appointed counsel at plea proceedings if actual imprisonment may result from the plea. *People v Bailey*, 7 Mich App 157, 159 (1967). If the defendant wishes to plead guilty without the advice of counsel, the court must obtain for the record a defendant's waiver of his or her right to counsel at all proceedings pertaining to the defendant's plea. When an indigent defendant is sentenced to jail pursuant to a plea obtained in the absence of counsel, the record must show that the defendant was offered counsel and made an intelligent and understanding waiver of counsel. *Bailey*, *supra* at 160.

*See Sections 3.45, 3.46, and 3.48 for quick reference materials regarding the conduct of plea proceedings.

MCR 6.610(E)(2)* sets forth specific conditions with which a district court must comply before accepting a defendant's guilty or no contest plea to an offense over which the district court has jurisdiction:

> "The court shall inform the defendant of the right to the assistance of an attorney. If the offense charged requires on conviction a minimum term in jail, the court shall inform the defendant that if the defendant is indigent the defendant has the right to an appointed attorney. The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended."

*Effective January 1, 2006. Amendments to MCR 6.610 (E)(2) incorporate the holding in *Alabama v Shelton*, 535 US 654 (2002). See Section 3.29 for more information.

MCR 6.610(F)(2)* addresses enhancement of a subsequent charge as it relates to an indigent defendant's right to counsel in a previous conviction. MCR 6.610(F)(2) states:

> "Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction."

*As amended, effective January 1, 2006.

3.28 Advice About the Right to Trial

Before the court accepts a defendant's guilty plea, the court must advise the defendant of the rights the defendant will waive as a result of pleading guilty. According to MCR 6.610(E)(3)(b),* the court must inform the defendant

> "that if the plea is accepted the defendant will not have a trial of any kind and that the defendant gives up the following rights that the defendant would have at trial:*
>
> > "(i) the right to have witnesses called for the defendant's defense at trial,
> >
> > "(ii) the right to cross-examine all witnesses called against the defendant,
> >
> > "(iii) the right to testify or to remain silent without an inference being drawn from said silence,
> >
> > "(iv) the presumption of innocence and the requirement that the defendant's guilt be proven beyond a reasonable doubt.

*As amended, effective January 1, 2006.

*See Sections 3.45, 3.46, and 3.48 for quick reference materials about plea proceedings in district court.

Right to a trial by jury. A defendant has a constitutional right to be tried by a jury in misdemeanor cases even when conviction would not result in imprisonment. Const 1963, art 1, § 20; *People v Antkoviak*, 242 Mich App 424, 463 (2000). In *Antkoviak*, the defendant was charged with violating MCL 436.1703 (minor in possession) and was denied a jury trial because conviction would not result in incarceration.* The Court of Appeals concluded that Michigan's constitution guaranteed a trial by jury to any defendant accused of a criminal offense. The Court explained that although MCL 436.1703 proscribes conduct classified as a "petty offense," the conduct prohibited is clearly classified by statute as a "crime" for which a defendant has the right to a trial by jury. MCL 750.5; *Antkoviak*, *supra* at 471, 481.

*Effective September 1, 2004, repeat offenders of MCL 436.1703 could be subject to time in jail. 2004 PA 63.

Electing a bench trial. A defendant is entitled to a jury trial "when required by law." MCR 6.610(D)(1)(c)(iii).* However, a defendant may waive his or her right to a jury trial. MCR 6.401 applies to matters of procedure involving criminal offenses over which the circuit court has jurisdiction, and although it is not expressly applicable to procedural matters involving offenses over which the district court has jurisdiction, the rule may be instructive. MCR 6.401 mirrors MCL 763.3, which does *not* distinguish between the jurisdictional requirements of district or circuit courts. MCL 763.3 provides in part:

> "(1) *In all criminal cases arising in the courts of this state* the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury." (Emphasis added.)

*As amended, effective January 1, 2006. Prior to January 1, 2006, a defendant had a right to a jury trial "unless he or she [wa]s charged under an ordinance that does not correspond to a criminal statute or permit a jail sentence[.]"

MCR 6.401 itself states that a defendant has the right to be tried by a jury but may waive the right to a jury and choose to be tried by the court.* A defendant's election to be tried by the bench requires the prosecutor's consent and the court's approval. *Id*.

*No similar provision is found in the court rules specifically applicable to proceedings involving offenses cognizable in district court.

MCL 763.3(1) requires that a defendant wishing to waive the right to a jury trial make and sign a written statement of waiver similar in substance to the example contained in the statute.* In addition to the written waiver, in cases involving crimes other than minor offenses, "the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel." MCL 763.3(2).

*Language used in the statute appears verbatim in SCAO Form MC 260 (Waiver/Jury Trial).

With the exception of requiring the written waiver, MCR 6.402 (a rule not specifically made applicable to criminal procedure involving offenses cognizable in district court but which may be instructive where no other rule applies) mirrors the other legislative requirements of a defendant's waiver of the right to be tried by a jury. MCR 6.402 states:

> **"(A) Time of Waiver.** The court may not accept a waiver of trial by jury until after the defendant has been arraigned or has waived an arraignment on the information, or, in a court where arraignment on the information has been eliminated under MCR 6.113(E),* after the defendant has otherwise been provided with a copy of the information, and has been offered an opportunity to consult with a lawyer.
>
> **"(B) Waiver and Record Requirements.** Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding."

*Effective January 1, 2006. Circuit courts may eliminate arraignments for defendants who are represented by an attorney and who receive a copy of the information by other means.

3.29 Advice About Possible Sentence

Before a court may accept a defendant's guilty or no contest plea, the court must inform the defendant of any mandatory minimum jail sentence for a conviction of the offense, as well as the maximum possible penalty permitted by statute. MCR 6.610(E)(3)(a). The extent to which a trial court may involve itself in sentence negotiations is defined by the Michigan Supreme Court's decisions in *People v Killebrew*, 416 Mich 189 (1982), and *People v Cobbs*, 443 Mich 276 (1993).

Killebrew limits a trial court's involvement to the approval or disapproval of a non-binding prosecutorial sentence recommendation linked to a defendant's guilty plea. *Killebrew, supra* at 209. Under *Killebrew*, a trial court may accept a defendant's guilty plea without being bound by any agreement between the defendant and the prosecution. *Id*. Where a trial court has decided not to adhere to the sentence recommendation accompanying the defendant's plea agreement, the court must explain to the defendant that it has decided not to accept the prosecutorial recommendation *and* the court must advise the defendant of the sentence it has determined is appropriate to the circumstances of the offense and the offender. *Killebrew*, *supra* at 209; *People v Scott*, 197 Mich App 28, 32 (1992). Following the court's rejection of the prosecutorial recommendation and its announcement of the intended sentence, the defendant must be given the opportunity to affirm or withdraw his or her guilty plea based on the court's expressed disposition. *Killebrew, supra* at 210; *Scott, supra* at 32. See also *People v Shuler*, 188 Mich App 548, 551–552 (1991), where the sentencing court expressly informed the defendant that it would exceed the sentence recommended by the prosecutor, named the specific sentence it intended to impose, and permitted the defendant to withdraw or affirm his guilty plea in light of the court's announcement.

♦ **Characteristics of negotiations under *Killebrew***

- a defendant's plea is linked to a non-binding prosecutorial sentence recommendation.
- the trial court may accept or reject the agreement as it exists.
- if the court rejects the agreement, the court must indicate what sentence it believes is appropriate under the circumstances.
- the defendant may affirm or withdraw his or her plea based on the trial court's expressed disposition.

*As amended, effective January 1, 2006.

MCR 6.310,* a rule not expressly applicable to procedural matters involving offenses over which the district court has trial jurisdiction, incorporates the outcome in *Killebrew*. MCR 6.310(B)(2)(a) states:

> "[T]he defendant is entitled to withdraw the plea if
>
> > "(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea[.]"

The Court's decision in *Cobbs* involved its review of a trial court's participation in sentence negotiations in the absence of an existing or proposed agreement between the defendant and the prosecution. *Cobbs, supra* at 282–284. *Cobbs* authorizes the trial court to make a preliminary evaluation of the sentence appropriate to the offense and the offender if requested by

either party. The prosecution or the defendant may ask the court to indicate on the record the length of imprisonment that appears appropriate for the charged offense, based on the information then available to the court. *Cobbs*, *supra* at 283. Even when a defendant pleads guilty or no contest to the charged offense in reliance on the court's preliminary determination regarding the defendant's likely sentence—a *Cobbs* agreement—the court retains discretion over the actual sentence imposed should additional information dictate the imposition of a longer sentence. *Id*. If the court determines it will exceed its previously stated sentence, the defendant has an absolute right to withdraw the plea.* *Id*.

- **Characteristics of negotiations under *Cobbs***
  - the defendant or the prosecution asks the trial court what sentence appears appropriate under the circumstances if a guilty plea was offered.
  - the court's preliminary evaluation is based on the information then available and the court retains discretion over the actual sentence imposed if additional information warrants a longer sentence.
  - if the court decides to impose a sentence longer than the sentence first indicated by the court, the defendant must be given an opportunity to withdraw his or her plea.

In *People v Williams*, 464 Mich 174 (2001), the Michigan Supreme Court distinguished between a trial court's role in sentence negotiations occurring under *Killebrew* and those occurring under *Cobbs*. According to the *Williams* Court, *Cobbs* modified *Killebrew* "to allow somewhat greater participation by the judge." *Williams, supra* at 177. However, the *Williams* Court ruled that the requirement of *Killebrew*—that a court must indicate the sentence it considers appropriate if the court decides against accepting the prosecutorial recommendation—does not apply to a *Cobbs* agreement later rejected by the court that made the preliminary evaluation. *Williams, supra* at 178–179. The Court explained the distinction between *Cobbs* and *Killebrew* as preserving the trial court's impartiality in sentence negotiations by minimizing the potential coercive effect of a court's participation in the process:

> "In cases involving sentence recommendations under *Killebrew*, the neutrality of the judge is maintained because the recommendation is entirely the product of an agreement between the prosecutor and the defendant. The judge's announcement that the recommendation will not be followed, and of the specific sentence that will be imposed if the defendant chooses to let the plea stand, is the first involvement of the court, and does not constitute bargaining with the defendant, since the judge makes that announcement and determination of the sentence on the judge's own initiative after reviewing the presentence report.
>
> "By contrast, the degree of the judge's participation in a *Cobbs* plea is considerably greater, with the judge having made the initial

assessment at the request of one of the parties, and with the defendant having made the decision to offer the plea in light of that assessment. In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

"Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand." *Williams*, *supra* at 179–180.

- **The impact of *Williams* on negotiations**

  – the *Williams* decision is implicated only when there exists a *Cobbs* agreement (the defendant has agreed to plead guilty based on the trial court's preliminary evaluation of the proper sentence), and the trial court determines it will not adhere to its preliminary sentence evaluation as reflected by the *Cobbs* agreement.

  – the defendant must be given an opportunity to withdraw his or her guilty plea after the court informs the defendant it will not abide by the sentence first announced.

  – unlike the requirement in *Killebrew* that arises when the court refuses to follow a prosecutorial sentence recommendation, when the trial court decides against imposing the sentence first articulated by the court itself (the *Cobbs* agreement), it may *not* inform the defendant of the sentence the court has since decided is appropriate (because to do so would involve the court in the sentence negotiation process to an extent carefully avoided in *Killebrew* and *Cobbs*).

*As amended, effective January 1, 2006.

MCR 6.310,* a court rule not expressly applicable to matters of criminal procedure involving cases cognizable in district court, incorporates the outcome in *Williams*. MCR 6.310(B)(2)(b) states:

"[T]he defendant is entitled to withdraw the plea if

* * *

"(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity

> to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

Plea agreements involving probation. A trial court may impose additional conditions on a defendant's sentence of probation, even when the sentence is part of the defendant's plea agreement and did not contain the additional conditions. *People v Johnson*, 210 Mich App 630, 633–634 (1995). In *Johnson*, the defendant moved to withdraw his plea or to force specific performance of the sentence agreement on which he relied when he offered his nolo contendere plea. According to the defendant, because the additional conditions imposed by court were not conditions to which he agreed, he did not knowingly or voluntarily agree to the sentence imposed. *Id.* at 632.

Based in large part on the "unique features of probation," the Court of Appeals affirmed the defendant's sentence as imposed by the trial court. *Johnson*, *supra* at 634. Noting that an order of probation may be altered or amended, in form and substance, without providing the defendant with notice of the change or an opportunity to be heard about it, the Court concluded "that a sentencing court may place conditions on a defendant's probation regardless of whether it was covered in the plea agreement." *Id*. at 634–635.

Collateral consequences to a defendant's guilty or no contest plea. A defendant's ignorance of "future collateral or incidental effects" of a valid guilty or no contest plea does not entitle the defendant to withdraw the plea at a later date. *People v Haynes*, 256 Mich App 341, 349 (2003); *People v Davidovich*, 463 Mich 446, 453 (2000). A defendant is not automatically entitled to withdraw such a plea because the plea is not made involuntary or unknowing when it results in consequences collateral to the defendant's involvement in the criminal offense charged, even when the defendant was not aware of the consequences at the time he or she tendered the plea. *Davidovich*, *supra* at 453 ("[I]mmigration consequences of a plea are collateral matters that do not bear on whether the defendant's plea was knowing and voluntary").

> **Note:** The Editorial Advisory Committee suggests that at the time of the plea proceeding, a court advise a defendant of any potential consequences of the defendant's plea then known to the court.
>
> In addition to a plea's potential impact on a defendant's immigration status, a defendant's plea to a charged offense could affect the defendant's probation or parole status. No court rule or statute requires a court to tell a defendant charged with a misdemeanor offense that his or her guilty plea may constitute a violation of the defendant's probation or parole. However, this information appears on SCAO Form DC 213 (Advice of Rights) in paragraph 7, and fairness and equity suggests that a defendant be provided with this information before the court accepts his or her guilty plea.

3.30 Plea Must Be Accurate

*See Section 3.48 for a script containing the essential components of a proper plea proceeding.

Before accepting a defendant's plea of guilty or nolo contendere to a misdemeanor or felony offense, the court must determine that the plea given is accurate.* MCR 6.610(E)(1); MCR 6.302(D). A guilty plea is valid as long as the court establishes a sufficient factual basis for finding that the defendant is responsible for the offense charged *or* the offense to which he or she pleaded guilty. *People v LaFay*, 182 Mich App 528, 531–532 (1990). It is error to accept a defendant's guilty plea when the defendant's testimony indicates his or her innocence. *People v Thomas*, 36 Mich App 589, 592–593 (1971). A court may not accept a defendant's guilty or no contest plea if the court is not convinced of the plea's accuracy. MCL 6.610(E)(1).

*See Section 3.35, below, for information on vacating an *accepted* plea.

According to statutory law, whenever a defendant pleads guilty, the court has a duty, "before pronouncing judgment or sentence upon such plea," to conduct the investigation necessary to determine that the plea was freely made with full knowledge of the nature of the accusation. MCL 768.35. If the court doubts the veracity of a guilty or no contest plea, the judge is obligated to vacate the plea,* direct entry of a not guilty plea, and order the case to trial. MCL 768.35.

When a defendant pleads guilty to a misdemeanor, the court should evaluate the accuracy of the plea by questioning the defendant to establish support for a finding that the defendant is indeed guilty of the offense charged *or* that the defendant is guilty of the offense to which he or she is pleading. MCR 6.610(E)(1)(a). Even when an exculpatory inference could be drawn from a defendant's admissions and the defendant urges the adoption of that exculpatory inference, if an inculpatory inference can be drawn from the same admissions, a factual basis in support of the defendant's guilty plea exists. *People v Thew*, 201 Mich App 78, 85, 87 (1993); *Guilty Plea Cases*, 395 Mich 96, 128–132 (1975).

Establishing the accuracy of a defendant's no contest plea. When a defendant pleads nolo contendere, the court may not determine whether the plea is accurate by questioning the defendant about his or her participation in the offense. Rather, the court must determine the propriety of the no contest plea on the basis of other available information. MCR 6.610(E)(1)(b). The court rule does not suggest what "other available information" might include, but case law indicates that any evidence properly admitted may be used to establish the factual basis for a defendant's nolo contendere plea.

The Michigan Supreme Court affirmed a trial court's use of the transcript of a defendant's preliminary examination to establish a factual basis for the defendant's nolo contendere plea in *People v Chilton*, 394 Mich 34 (1975). The *Chilton* Court observed:

> "If a defendant were compelled by direct testimony to provide the factual basis to convince a court that he had committed a crime, his plea, regardless of the label attached, would be a guilty plea. A

> nolo contendere plea by its nature prohibits an examining magistrate from eliciting from the defendant the requisite factual basis to support a nolo plea. But this does not relieve the magistrate from establishing a sufficient basis. It simply means that basis must be established via another medium." *Chilton*, *supra* at 37–38.

See also *People v Johnson*, 122 Mich App 26, 28 (1982) (parties stipulated to use of a police report to establish a factual basis for the defendant's no contest plea).

When a defendant offers to plead no contest to a specific intent crime but claims he or she was too intoxicated to form the requisite intent, the prosecution must provide evidence to refute the intoxication defense. If no refutation is offered, no factual basis exists to support the element of specific intent, and the court may not properly accept the defendant's no contest plea. *People v Polk*, 123 Mich App 737, 740–741 (1982).

If a defendant's no contest plea is accepted, MCR 6.302 (not expressly applicable to procedural matters involving offenses cognizable in district court) requires that the court "state why a plea of nolo contendere is appropriate." MCR 6.302(D)(2)(a). An appellate court must remand a case to the trial court for supplementation of the record where the trial court did not provide proper justification for its failure to directly question the defendant. *People v Harper*, 83 Mich App 390, 400–401 (1978). Even where a trial court relied on a preliminary examination transcript as factual support for a defendant's no contest plea, the court was still required to indicate for the record "a valid reason for not personally interrogating the defendant." *Id*.

> **Note:** The court rules governing criminal procedure in cases involving offenses over which the district court has trial jurisdiction contain no requirement similar to MCR 6.302(D)(2). Though not required, a district court's articulation for the record of its reasons for finding a defendant's nolo contendere plea appropriate would almost certainly assist any appellate review of the case. Both MCR 6.302(D) and 6.610(E) do require that the court determine that the defendant's plea is supported by facts indicating the defendant's participation in the crime charged.

3.31 Plea Must Be Understanding and Voluntary

In addition to establishing a plea's accuracy, a court must determine that the plea given is understanding and voluntary before accepting it. MCR 6.610(E)(1). Section 3.48 contains a script of a plea proceeding's essential components.

*See Section 3.27 for the text of MCR 6.610(E)(2).

An understanding plea in district court. Before a district court may accept a defendant's guilty or nolo contendere plea, the court must comply with the requirements of MCR 6.610(E), which requires that the court inform the defendant of his or her right to the assistance of an attorney. MCR 6.610(E)(2).*

An understanding plea requires that a defendant be advised of any mandatory minimum jail sentence that would be imposed for conviction of the charged offense as well as the maximum possible penalty for conviction. MCR 6.610(E)(3)(a).

*See Section 3.28 for the text of MCR 6.610(E)(3)(b).

Before accepting a defendant's guilty or no contest plea, the court must also advise the defendant of his or her right to trial and of the rights attendant to the right to trial. MCR 6.610(E)(3)(b).*

*As amended, effective July 13, 2005.

An understanding plea in circuit court. MCR 6.302(B), a rule expressly applicable to matters of procedure involving offenses over which the circuit court has jurisdiction, contains a few details not found in MCR 6.610(E) that may be helpful in assuring that a defendant's plea in district court is understanding and voluntary. MCR 6.302(B)* specifically requires that the court speak directly to the defendant or defendants and "determine that each defendant understands" the factors listed in MCR 6.302(B)—many, but not all, of which are found in MCR 6.610(E). MCR 6.302(B) requires the court to advise the defendant of the following information not found in MCR 6.610(E):

> "(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea[, and]
>
> "(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right."* MCR 6.302(B)(4)–(5).

*See Section 3.40 for information on appealing plea-based convictions.

*As amended, effective January 1, 2006.

A voluntary plea in district court. MCR 6.610(E)(6) indicates the method by which a court is to determine whether a defendant's plea is voluntary. In determining a plea's voluntariness, MCR 6.610(E)(6)* requires the court to ask a defendant specific questions before accepting the defendant's guilty or nolo contendere plea:

> "The court must ask the defendant:
>
> > "(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

> "(b) whether anyone has threatened the defendant; and
>
> "(c) whether it is the defendant's own choice to plead guilty."

A voluntary plea in circuit court. MCR 6.302(C)(4), a rule not expressly applicable to plea proceedings involving offenses cognizable in district court, includes information similar to that found in MCR 6.610(E)(6). In addition to the questions directed at the defendant required by both court rules, MCR 6.302(E) requires the court to further question the prosecutor and defense attorney. Under MCR 6.302(E), the trial court must ask the prosecutor and the defendant's attorney "whether either is aware of any promises, threats, or inducements other than those already disclosed on the record." MCR 6.302(E). The court must also ask the parties whether they are satisfied that the court has complied with the requirements of MCR 6.302(B)–(D); a defendant's plea may not be accepted until any deficiency is corrected. MCR 6.302(E).

A trial court's acceptance of a defendant's guilty or no contest plea is implicit proof of the court's determination that the plea was freely, understandingly, and voluntarily made. *Guilty Plea Cases*, 395 Mich 96, 126 (1975).

Before imposing a defendant's sentence on a guilty or no contest plea, a trial court must investigate the truth of the defendant's plea to the extent necessary to satisfy the court that the plea was given freely, without undue influence, and with full knowledge of the nature of the offense to which the defendant pleaded. MCL 768.35.

> "In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance." *People v Thew*, 201 Mich App 78, 82 (1993), quoting *In re Valle*, 364 Mich 471, 477 (1961).

More evidence is required to establish that a defendant's plea was involuntary than simply that the defendant received incorrect advice from counsel. *People v Wilhite*, 240 Mich App 587, 596 (2000).

Appellate review of a defendant's waiver of rights requires a determination that there was a "voluntary relinquishment of a known right . . . [which requires a determination] that the person had a right, that he knew he had it, and that he freely and knowingly elected not to exercise it." *People v Phillips*, 383 Mich 464, 470 (1970).

3.32 Unconditional Guilty Pleas

A defendant's unconditional guilty or no contest plea waives his or her right to challenge issues involving the defendant's factual guilt. *People v New*, 427

Mich 482, 491 (1986); *People v Eaton*, 184 Mich App 649, 654 n 3 (1990). The same unconditional guilty or no contest plea does not necessarily waive a defendant's right to challenge the state's authority to bring the defendant to trial. *New, supra* at 495–496; *Eaton, supra* at 658.

Pretrial evidentiary issues. By pleading guilty or nolo contendere, a defendant waives the right to raise issues on appeal regarding a pretrial denial of his or her motion to suppress evidence or quash the information because those issues involve the defendant's factual guilt. *New, supra* at 485.

Statutes of limitation. The statute of limitations in a criminal case is an affirmative, waivable, nonjurisdictional defense. *People v Burns*, 250 Mich App 436, 440 (2002); *People v Bulger*, 462 Mich 495, 517 n 7 (2000). A defendant's unconditional plea of guilty or no contest waives the defendant's right to challenge his or her conviction on the ground that the applicable limitations period had expired. *People v Allen*, 192 Mich App 592, 600 (1992).

*For more information about appealable issues in cases involving unconditional guilty pleas, see Section 3.38, below.

In *Allen*, a warrant charging the defendant with CSC-1 issued in October 1980, and the defendant's whereabouts were unknown for more than eight years after issuance of the warrant. *Allen*, *supra* at 594. In January 1989, the prosecutor filed a *nolle prosequi*. *Id*. Six months later, the defendant's whereabouts were discovered, and the prosecutor refiled the charges against the defendant. *Id*. at 598. The defendant's motion to quash the information on the ground that his prosecution was barred by the statute of limitations was denied, and the defendant pleaded no contest to CSC-1. *Id*. at 594. In affirming the defendant's conviction, the Court of Appeals recognized the argument that a limitations period may "implicate[] the very authority of the state to bring the defendant to trial," but the Court ultimately decided that the statute of limitations defense is more closely related to determining a defendant's factual guilt.* *Id*. at 601–602, quoting *People v New*, *supra* at 495. According to the *Allen* Court:

> "[A]n unconditional plea of guilty or nolo contendere waives the statute of limitations defense because, even though the effect of a successful defense is to prevent the state from obtaining a conviction, the purpose of the statute relates to determining a defendant's factual guilt." *Allen*, *supra* at 602.

A limitations period serves to reduce the potential for inaccuracies, stale evidence, lost witnesses, and fading memories, which are important components of establishing a defendant's factual guilt. *Id*.

*As amended, effective January 1, 2006.

Waiver of any issue involving the 180-day rule. A defendant's unconditional guilty plea waives any appellate challenge based on the 180-day rule. MCR 6.004(D)* defines the rule:

> **"(1) The 180-Day Rule.** Except for crimes exempted by MCL 780.131(2)[a criminal offense committed by an inmate of a state correctional facility while incarcerated in the facility or a criminal offense committed by an inmate after escaping from a correctional facility but before he or she is returned to the facility], the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail."*

*See Section 6.43 in *Criminal Procedure Monograph 6: Pretrial Motions—Third Edition* (MJI, 2006), for detailed discussion of the 180-day rule.

Before 1988 PA 400 amended the 180-day rule to exempt offenses committed by an inmate while incarcerated in a correctional facility or offenses committed after an inmate escaped from a correctional facility and before he or she was returned to the facility, Michigan courts were divided in decisions involving the 180-day rule and no contest or guilty pleas. See e.g., *People v Eaton*, 184 Mich App 649, 651–652 (1990). The Michigan Supreme Court resolved the conflict by holding that the Legislature's intent in adopting the 180-day rule—even before the amendments of 1988 PA 400—was to promote concurrent sentencing by promptly trying defendants subject to more than a single term of imprisonment. *People v Smith*, 438 Mich 715, 718–719 (1991) (the defendant committed the offense after her escape from prison but before her return to custody). According to the *Smith* Court, that purpose was not furthered by application of the 180-day rule to a defendant's trial on a charge for which a consecutive sentence would be mandated if the defendant was convicted. *Smith, supra* at 717–718, overruling *People v Woodruff*, 414 Mich 130 (1982) and citing with approval *People v Loney*, 12 Mich App 288, 292 (1968).

In concluding that the 180-day rule was not applicable to the defendant's case in *Smith*, the Supreme Court affirmed the Court of Appeals' decision in *Eaton, supra,* on the same basis. *People v Eaton*, 439 Mich 915 (1992) (the defendant's offense occurred while he was incarcerated in a correctional facility).

3.33 Conditional Guilty Pleas

MCR 6.301(C)(2) pertains to conditional pleas, but MCR 6.301 is not enumerated in MCR 6.001(B) as applicable to plea proceedings involving

offenses over which the district court has trial jurisdiction. However, the information contained in the court rule is instructive. MCR 6.301(C)(2) states:

> "A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only."

Conditional guilty pleas may be appropriate when a defendant has a "legitimate legal defense notwithstanding his factual guilt." *People v Reid*, 420 Mich 326, 334 (1984). A conditional guilty plea anticipates that the prosecution may be precluded from proving its case against a defendant because of claims or defenses to which the defendant believes he or she is entitled. *Id*. at 334–335.

"A conditional [guilty] plea requires the agreement of the defendant, the prosecutor, and the judge." *People v Andrews*, 192 Mich App 706, 707 (1992). When a defendant tenders a conditional guilty plea, the record must reflect the prosecution's explicit agreement to the defendant's request to make the plea conditional on his or her pursuit of an issue previously ruled on by the trial court and preserved by the defendant's conditional plea. A prosecutor's silence is not implicit consent to the defendant's conditional plea for the purpose of satisfying the rule requirement. *People v McFadden*, 170 Mich App 640, 642 (1988).

In *McFadden*, the Michigan Supreme Court reversed the Court of Appeals and remanded the case to the circuit court where the defendant was to be permitted 30 days to withdraw his plea. According to the Supreme Court:

> "[T]he record is clear in this case that the agreement concerning the preservation of the issue in question was made in the presence of the assistant prosecuting attorney [who] did not object to this agreement nor consent to it[. U]nder the circumstances of this case we believe the appropriate remedy is to place the defendant in the position he enjoyed prior to making the agreement in question." *People v McFadden*, 433 Mich 868 (1989).

3.34 Prohibited Pleas

Unless the prosecutor consents, MCR 6.301(D) prohibits a court from accepting a defendant's plea to an offense lesser than the one charged. MCR 6.301 applies to matters of procedure involving offenses cognizable in circuit

court but may be instructive with regard to plea proceedings involving offenses cognizable in district court.

3.35 Refusing To Accept a Plea or Plea Agreement

MCR 6.301(A), applicable to procedural matters involving felony offenses and potentially instructive in cases involving offenses cognizable in district court, permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules. Where a court refuses to accept a defendant's plea, the court must enter a plea of not guilty on the record. *Id*.

"[T]he trial court's exclusive authority to impose sentence does not allow it to enforce only parts of a bargain." *People v Siebert*, 450 Mich 500, 510–511 (1995). When a defendant's plea was given in exchange for a specific sentencing agreement, the defendant must be given the opportunity to withdraw the plea if the trial court refuses to accept the sentence agreement.* *People v Killebrew*, 416 Mich 189, 194–195 (1982). A clear record must be made of the court's decision in such situations:

*See Section 3.29 for more information on a trial court's role in sentence negotiations.

> "Where it is clear on the record that a party is relying on an agreement regarding the sentence as part of a plea agreement, it is incumbent on the court at the time of accepting the plea to clarify whether it is accepting or rejecting the entire agreement or taking it under advisement." *Siebert*, *supra* at 513.

A defendant has no right to have his or her guilty plea accepted when offered. Whether the court accepts a defendant's plea and the attending sentence agreement is wholly within the court's discretion. *People v Grove*, 455 Mich 439, 461–462 (1997). A court may refuse to accept a plea agreement reached after the cutoff date set at a pretrial conference for such pretrial matters. *Grove*, *supra* at 469–471. The *Grove* Court affirmed the trial court's exercise of discretion "in refusing to entertain a tardy plea agreement." *Id*. at 469. The Court noted that "[t]he court rules provide for and encourage the use of scheduling orders to promote the efficient processing of civil and criminal cases." *Id*. at 465. MCR 6.610(B) expressly authorizes a district court,

> "on its own initiative or on motion of either party, [to] direct the prosecutor and the defendant, and, if represented, the defendant's attorney to appear for a pretrial conference. The court may require collateral matters and pretrial motions to be filed and argued no later than this conference."*

*As amended, effective January 1, 2006.

According to the Court deciding *Grove*, *supra*, a defendant is not deprived of any right when he or she tenders a plea after the date set for such matters and the court declines to accept the plea and orders the matter to trial. The Court explained:

> "The defendant has only an opportunity, not a right, to plead guilty. No right is denied when the opportunity is not timely exercised. Defendant has the right to a fair trial of the offense charged." *Grove*, *supra* at 471.

A trial court cannot, however, *sua sponte* vacate a defendant's guilty plea after the plea has been accepted. *People v Strong*, 213 Mich App 107, 110 (1995). In *Strong*, the court vacated the defendant's guilty plea at sentencing when the defendant insisted he was innocent of the charge to which he pleaded guilty but had entered the plea in exchange for the prosecution's dismissal of his habitual offender status and a second criminal sexual conduct charge. *Strong*, *supra* at 108–110. Once a plea is accepted but before sentence is imposed, "a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." MCR 6.310(B)(1).*

*As amended, effective January 1, 2006.

A plea may also be vacated on the prosecutor's motion "if the defendant has failed to comply with the terms of a plea agreement." MCR 6.310(E).*

*As amended, effective January 1, 2006.

3.36 Written Pleas

Under very specific circumstances, a case may be completely disposed of in writing and without the defendant ever having to appear personally before the court. MCR 6.610(D)(4) permits a defendant to enter a plea without personally appearing before the court under certain circumstances:

> "The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court."

*Effective January 1, 2006. Formerly MCR 6.610 (E)(6).

Provided some additional requirements are met, MCR 6.610(E)(7)* permits a defendant to enter a written plea of guilty or no contest. "Pleas by mail" are regularly used to accommodate traffic offenders from out of state. See SCAO Form DC 223 (Plea by Mail). MCR 6.610(E)(7)* states:

> "A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if

> "(a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;
>
> "(b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in subrule (3)(b);* and
>
> "(c) the court is satisfied that the waiver is voluntary."

*See Section 3.26(A) for a list of these rights.

Note: As amended, MCR 6.610(E)(7) eliminates the provisions contained in former MCR 6.610(E)(6)(b) that required the court, in advance of a plea, to give the defendant written notice of the sentence to be imposed and the rights enumerated in subrule (3)(b).

3.37 Pleas Under Advisement

Where the prosecutor and the defendant agree on a sentence in exchange for the defendant's guilty or nolo contendere plea, the court has discretion to accept or reject the plea agreement, take the matter under advisement, or defer any action until the court has an opportunity to review the defendant's presentence report. *People v Eloby*, 215 Mich App 472, 474 (1996).

A provision of a court rule expressly applicable to procedural matters involving offenses over which the circuit court has jurisdiction permits a court to take a defendant's plea "under advisement." MCR 6.302(C)(3)(d) and (F). No similar provision exists in the court rules concerning procedural matters involving offenses over which the district court has jurisdiction.

Note: A proposal was published in 437 Mich 1257–1258 (1991) that would have amended MCR 6.610 to include a detailed method by which district courts could accept pleas under advisement, but the proposal was never adopted.

Deferred adjudication provisions. There are several specific statutes authorizing a court to defer sentencing a defendant for a plea-based conviction provided the defendant complies with any terms or conditions on which the period of deferment is based. For example, MCL 333.7411(1)* permits a sentencing court to defer further proceedings on a first-time offender's conviction, whether by guilty plea or guilty verdict, for possession or use of specified controlled substances for a period of up to one year. Included in the statutory offenses listed in MCL 333.7411 for which deferment is authorized are several misdemeanor offenses punishable by as much as one year and as little as 90 days. See e.g., MCL 333.7403(2)(c) and MCL 333.7404(2)(a)–(d).

*MCL 333.7411(1) is the statutory deferment provision in the controlled substance act.

*For a comprehensive discussion of deferred adjudication, see Hummel, Criminal Procedure Monograph 8: *Felony Sentencing* (MJI, 2005), Sections 8.42 and 8.43.

When a court opts to defer adjudication under MCL 333.7411(1),* no judgment of guilt is entered on the record, and the offender must consent to the deferment. When the offender is placed on probation in lieu of immediate sentencing, the terms and conditions of his or her probation must include payment of a probation supervision fee described in MCL 771.3c. Participation in a drug treatment court is a term or condition that may be imposed on a defendant under §7411 deferral. MCL 333.7411(1).

When an offender fulfills the terms and conditions of his or her period of deferment, the court must discharge the offender and dismiss the offender's case without an adjudication of guilt. Except for nonpublic records of such arrests and discharges, which may only be disclosed under very specific circumstances, an offender's successful completion of the deferment period "is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413." MCL 333.7411(1).

When an offender violates a term or condition placed on his or her probationary period, the court has discretion whether to enter an adjudication of guilt on the matter and proceed with sentencing. The court may elect to continue the offender's probationary period under the same or stricter terms and conditions. MCL 333.7411.

Other statutes authorizing a court to defer adjudication for a period of time during which the defendant must comply with specific terms and conditions of the probationary period include:

- **MCL 750.350a(4), Parental Kidnapping Act**
  - deferment available to a parent convicted by plea or verdict if the parent has no previous kidnapping-related convictions.
  - without entering an adjudication of guilt and with the parent's consent, the court may defer further proceedings and place the parent on probation pursuant to lawful terms and conditions.
  - participation in a drug treatment court may be made a term or condition of deferral. MCL 750.320a(4).
  - if the parent violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized.
  - if the parent fulfills the terms and conditions of probation, the court must discharge the parent from probation and dismiss the proceedings against him or her.
  - discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of disqualification or disabilities imposed by law for conviction of a crime.

- **MCL 769.4a, Spouse Abuse Act**
  - deferment available to an accused convicted by plea or verdict if the accused has no previous convictions for domestic assault against a specified victim. MCL 769.4a(1).

    > Specified victims are the offender's spouse or former spouse, a person with whom the offender has had a child, a person with whom the offender has or has had a dating relationship, or a person who resides or has resided in the same household with the offender.

  - with the consent of the accused and of the prosecuting attorney in consultation with the victim, the court may, without entering a judgment of guilt, defer further proceedings and place the accused on probation. MCL 769.4a(1).
  - the order of probation may require the accused to pay for and participate in a mandatory counseling program. MCL 769.4a(3).
  - participation in a drug treatment court may be made a term or condition of deferral. MCL 769.4a(3).
  - with the exception of violations that require the court to enter a judgment of guilt, if the accused violates a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise authorized. MCL 769.4a(2).
  - the court must enter an adjudication of guilt and proceed as authorized if the accused commits an assaultive crime during probation. MCL 769.4a(4)(a).
  - the court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order to receive counseling. MCL 769.4a(4)(b).
  - the court must enter an adjudication of guilt and proceed as authorized if the accused violates the court's order that he or she have no contact with a named individual. MCL 769.4a(4)(c).
  - if the accused fulfills the terms and conditions of probation, the court must discharge the individual from probation and dismiss the proceedings against him or her. MCL 769.4a(5).
  - discharge and dismissal is without an adjudication of guilt and is not a conviction for purposes of disqualification or disabilities imposed by law for conviction of a crime. MCL 769.4a(5).
- **MCL 762.11, Holmes Youthful Trainee Act**
  - deferment as a youthful trainee is available to offenders who plead guilty to a criminal offense, other than a felony for which the

maximum punishment is life imprisonment, a major controlled substance offense, or a traffic offense.

- the offense occurred on or after the offender's 17th birthday but before his or her 21st birthday.
- participation in a drug treatment court may be made a term or condition of deferral. MCL 762.13(1)(b).
- without entering a judgment of conviction and with the offender's consent, the court may assign the offender to the status of youthful trainee.
- MCL 762.13 and 762.14 contain provisions specific to the terms and conditions of an individual's deferment as a youthful trainee.

3.38 Withdrawing or Challenging a Plea

*As amended, effective January 1, 2006. Formerly MCR 6.610(E)(7)(a).

When a motion to withdraw a plea may be made. A defendant may not challenge a plea on appeal unless the defendant first motions the trial court to withdraw the plea for noncompliance with applicable court rules. MCR 6.610(E)(8)(a).* A defendant may make a motion to withdraw his or her plea before or after sentencing. *Id*. If the motion to withdraw is made after the sentence has been imposed, it must be made within the time limits governing applications for leave to appeal outlined in MCR 7.103(B)(6) (within 21 days from entry of judgment unless otherwise provided by statute or, for delayed applications for leave, no more than six months after judgment is entered and must include an affidavit explaining the delay). MCR 6.610(E)(8)(a).

Standards for withdrawal of pleas. When a defendant moves to withdraw his or her plea, the trial court must determine whether a deviation from the court rules occurred during the plea process, and if so, whether the deviation affected the defendant's substantial rights. MCR 6.610(E)(8)(b). If the court concludes that a deviation affecting the defendant's substantial rights occurred, the court must correct the deviation *and* offer the defendant the option of withdrawing his or plea. *Id*. If the court concludes either that no deviation occurred or that any deviation that occurred did not affect the defendant's substantial rights, a defendant may withdraw his or her plea "only if it does not cause substantial prejudice to the people because of reliance on the plea." *Id*.

*As amended, effective January 1, 2006.

Plea withdrawal in circuit court. Court rules specific to matters of procedure involving offenses over which the circuit court has jurisdiction give a defendant the "right to withdraw any plea until the court accepts it on the record." MCR 6.310(A). Even when a circuit court has already accepted a plea on the record, there are circumstances under which the plea may be withdrawn before sentencing. MCR 6.310(B)* provides the parameters of withdrawing a plea *after* the plea has been accepted, but *before* the court has imposed sentence:

"After acceptance but before sentence,

> "(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C)."

"In the interest of justice" and "substantial prejudice." A defendant wishing to withdraw a plea after it has been accepted has the initial burden of providing reasons sufficient to establish that withdrawing the plea would be "in the interest of justice." If the defendant satisfies this element, the burden shifts to the prosecution to show that "substantial prejudice" would result if the court permitted the defendant to withdraw his or her plea. *People v Gomer*, 206 Mich App 55, 57–58 (1994). "Substantial prejudice" requires the prosecution to show that its ability to prosecute the defendant was hampered, not merely inconvenienced, by the delay resulting from its reliance on the defendant's plea. *Id*.

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, 264 Mich App 139, 150 (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant's plea was based.

*See Section 3.29 for a detailed discussion of a trial court's proper role in sentence negotiations.

When no sentence agreement is involved, a defendant who wishes to withdraw his no contest plea before sentencing must comply with the requirements of MCR 6.310(B)(1).* Unless claiming an error in the plea proceeding itself, the defendant has the burden of showing that withdrawal of the plea is in the interest of justice; that is, the defendant must show that there is a fair and just reason for withdrawal. MCR 6.310(B)(1); *Patmore, supra* at 150–151. If the defendant satisfies this burden, then the prosecution must establish that substantial prejudice would result if the defendant was permitted to withdraw his plea. The *Patmore* Court explained:

*As amended, effective January 1, 2006.

> "In keeping with this standard, we believe that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant's no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. If the defendant fails to meet

> this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court." *Patmore, supra* at 152 (internal citations omitted).

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant's motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant's motion for new trial is generally regarded with suspicion and considered untrustworthy. *Id*. at 153. In the context of a new trial, a defendant would be required to establish either the veracity of the witness' recanted testimony or the falsity of the witness' initial testimony. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

In *Patmore*, the defendant argued that the witness' preliminary examination testimony against him was the result of coercion. He claimed that the witness was threatened with losing custody of her child if she did not testify against the defendant. The Court of Appeals reversed the trial court's decision allowing the defendant to withdraw his plea because the defendant

> "failed to prove by a preponderance of credible evidence that [the complainant]'s preliminary examination testimony was untruthful, particularly given [the police officer]'s preliminary examination testimony which clearly supported [the complainant]'s original description of the offense and defendant's intent." *Patmore, supra* at 154.

*As amended, effective January 1, 2006.

Even when a defendant insists he is innocent of the charge to which he pleaded guilty, a trial court may not *sua sponte* vacate an accepted plea. *People v Strong*, 213 Mich App 107, 111–112 (1995). After a defendant's guilty plea has been accepted, his or her consent is required before a court may vacate the plea on the court's own motion. *Id*. at 112; MCR 6.310(B)(1).* The *Strong* Court noted that to the extent MCL 768.35 appeared to conflict with MCR 6.310(B), the court rule controlled "[b]ecause the mechanism for the withdrawal of an accepted plea is a matter of practice and procedure." *Strong, supra* at 112–113.

Plea withdrawals and sentence agreements. There exists no absolute right to withdraw a guilty plea after it has been accepted by the court. A defendant wishing to withdraw a plea before being sentenced must establish a fair and just reason for withdrawal of the plea. *People v Harris*, 224 Mich App 130, 131 (1997). But where a defendant pleads guilty based on the court's preliminary evaluation of an appropriate sentence, the defendant does have an

absolute right to withdraw his or her plea if the court imposes a sentence greater than the one on which the defendant relied.* *People v Cobbs*, 443 Mich 276, 283 (1993).

MCR 6.310(B)(2),* a rule not expressly applicable to procedure in cases over which the district court has trial jurisdiction, governs plea withdrawals in circuit court when a sentence agreement is involved:

*As amended, effective January 1, 2006.

> "(2) the defendant is entitled to withdraw the plea if
>
> > "(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or
> >
> > "(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

A defendant's failure to comply with terms of a plea agreement. A court may vacate a defendant's plea on the prosecutor's motion if the defendant failed to comply with the conditions of the defendant's plea agreement. MCR 6.310(E).* Where a defendant is sentenced according to the terms agreed on in his plea agreement, the court did not abuse its discretion in refusing to allow the defendant to withdraw his plea. *People v Eloby*, 215 Mich App 472, 476 (1996).

*As amended, effective January 1, 2006. Prior to the amendment, the action permitted under this rule provision (formerly MCR 6.310(C)) must have occurred *before* a defendant's sentence was imposed.

Where the defendant violated both the letter and the spirit of his plea agreement, the trial court properly denied the defendant's motion to withdraw his plea. *People v Kean*, 204 Mich App 533, 536 (1994). In *Kean*, the defendant pleaded guilty to armed robbery pursuant to a plea agreement in which he received a sentence recommendation. Part of the agreement required the defendant to enter a residential treatment facility within 24 hours after the court accepted his plea. The defendant was expected to remain in the treatment facility until his scheduled sentencing hearing. *Id*. at 535.

The defendant entered the program within 24 hours of pleading guilty, but he left the program after one week. The defendant failed to report to the Sheriff's Department after leaving the treatment program, and he failed to appear at his presentence interview or at his sentencing. *Id*. at 535–536. The defendant was not rearrested until more than two-and-one-half years after he had entered his plea and then left the residential treatment center. *Id*. at 536. When the defendant was sentenced to a longer term than was recommended by the original plea agreement, the trial court denied his motion to withdraw his plea.

A defendant's right to withdraw his or her plea before sentencing when the trial court decides against honoring the sentence recommendation on which the defendant relied in making the plea agreement is not absolute. *Id*. In *Kean*, the Court concluded that the defendant implicitly waived his right to withdraw his guilty plea when he left the treatment facility's custody and failed to appear at scheduled times. *Id*.

*As amended, effective January 1, 2006.

Challenging a plea after sentencing. MCR 6.610(E)(8)* addresses the process when "a defendant seeks to challenge the plea." Similar to provisions found in MCR 6.310(C), MCR 6.610(E)(8) states:

*Not more than six months after entry of judgment.

> "(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.103(B)(6).*
>
> "(b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.
>
> "(c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries."

*As amended, effective January 1, 2006. Formerly MCR 6.311(C).

A defendant wishing to appeal a plea-based conviction over which the circuit court had jurisdiction must first raise the issue in trial court. MCR 6.310(D)* states:

> **"(D) Preservation of Issues.** A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal."

Future changes in law may not justify withdrawal of previous plea. Michigan case law contains repeated rulings that a defendant may not withdraw a valid guilty plea simply because the plea was tendered without knowledge "of the future collateral or incidental effects of the initial valid plea." *People v Haynes*, 256 Mich App 341, 349 (2003). A defendant's "change of mind" is not a valid basis for permitting a defendant to withdraw his or her plea. *People v Everard*, 225 Mich App 455, 458 (1997).

The Michigan Supreme Court refused to permit a resident alien to withdraw his guilty plea after a change in federal immigration law mandated the defendant's deportation based on multiple convictions that included his previous guilty plea. *People v Osaghae*, 460 Mich 529, 533 (1999). The Court declined the defendant's suggestion that his prior plea was invalid because he was not advised of possible federal consequences to the state conviction. The Court noted that even if the federal law had been in effect at the time of the defendant's guilty plea, there existed no state law requiring that the defendant be advised of federal consequences to a guilty plea. According to the *Osaghae* Court,

> "Absent a substantial change in law that is to be applied retroactively, the validity of a guilty plea is to be determined under the law on the day the plea is taken. And even in such an instance, high thresholds must be cleared if a defendant seeks to withdraw a plea after a lengthy delay, or for reasons relating to the consequences of the plea." *Id*.

Defects in previous plea-based conviction may not necessarily invalidate its use to enhance future offenses. The Michigan Supreme Court refused to permit a defendant to withdraw a previous plea to OUIL-2nd following his arrest and status as an OUIL-3rd offender, where the defendant's retained counsel allowed the defendant to plead and be sentenced for the OUIL-2nd violation on the basis of a clearly deficient plea. *People v Ward*, 459 Mich 602 (1999). In *Ward*, the defendant pleaded guilty to OUIL-2nd at a 1995 arraignment. In 1996, the defendant was arrested and charged with OUIL-3rd. The defendant challenged his plea to OUIL-2nd on the ground that it lacked a sufficient factual basis. The record reflected that no prosecutor was present at the defendant's 1995 plea proceeding. Further, the record was undisputed that the trial court failed to comply with the requirements of MCR 6.610(E). *Ward*, *supra* at 606.

Plea pursuant to drug treatment court admission. Circuit and district courts are authorized to institute or adopt a drug treatment court.* MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). Criteria for admission, operating requirements, and procedural information about drug treatment courts may be found in the revised judicature act. See MCL 600.1060 *et seq*.

*Effective January 1, 2005, 2004 PA 224.

An individual who pleads guilty to a charged offense in order to apply for admission to a drug treatment court must be permitted to withdraw his or her plea if the individual is not admitted to the program. MCL 600.1068(5).

3.39 Prosecutor's Right To Withdraw From a Plea Agreement

Where the court accepts a plea bargain in which the prosecutor and the defendant agreed to the sentence to be imposed, the court may not then impose

on the defendant a sentence lower than the one to which the prosecutor agreed. To allow such a departure offends the prosecutor's charging authority, and if the court deviates from the agreement between the defendant and the prosecutor, the prosecutor must be permitted to withdraw. *People v Siebert*, 450 Mich 500, 504 (1995).

> "Plea bargains [] are more than contracts between two parties. As the judicial representative of the public interest, the trial judge is an impartial party whose duties and interests are separate from and independent of the interests of the prosecutor and defendant. The court's interest is in seeing that justice is done. In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority. A trial court may reject pleas to reduced charges, and it may protect its sentencing discretion by rejecting sentence agreements. In this sense, neither the prosecutor nor the defendant can dictate the sentence." *Siebert*, *supra* at 509–510 (footnote omitted).

*As amended, effective January 1, 2006.

A prosecutor may motion for vacation of a defendant's plea agreement if the defendant has failed to comply with the agreement's terms. MCR 6.310(E).* The court's disposition of a prosecutor's motion under this rule is discretionary, however, and the rule does not entitle a prosecutor to the remedy outlined there. *Id*.

> **Mote:** Prior to January 1, 2006, the action permitted under MCR 6.310(E) (formerly MCR 6.310(C)) must have occurred *before* a defendant's sentence was imposed.

3.40 Appealing a Plea-Based Conviction

*As amended, effective July 13, 2005.

According to MCR 6.625,* which makes no distinction between appeals based on convictions by plea or verdict, subchapter 7.100 of the court rules governs appeals in misdemeanor cases.

*As amended, effective July 13, 2005. See Section 3.31 for the text of MCR 6.302(B)(5).

Michigan law does not provide an appeal of right to defendants convicted by plea. Appeal from a plea-based conviction is by application for leave to appeal. MCL 770.3(1)(d). See also MCR 6.302(B)(5).*

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004), and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a(1) and (4), the statutory provisions that address the appointment of appellate counsel, or the waiver of appointed appellate counsel, to indigent defendants convicted by plea.

Specifically, the *Halbert* Court held "that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert, supra* at ___. The *Halbert* Court examined Michigan's appellate court system and noted that an appeal to the Michigan Court of Appeals, whether by right or by leave, is a defendant's first-tier appeal and that, to some degree, the Court of Appeals' disposition of these appeals involves a determination of the appeals' merit. The *Halbert* Court noted that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill-equipped to represent themselves," a critical fact considering that the Court of Appeals' decision on those defendants' applications for leave to appeal may entail an adjudication of the merits of the appeal. Said the Court:

> "Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert, supra* at ___.

A defendant may challenge his or her guilty plea in district court in the time allotted for applications for delayed leave to appeal in circuit court; that is, a defendant must appeal a plea-based conviction within six months after the judgment of sentence was entered.* MCR 6.610(E)(8); MCR 7.103(B)(6); *People v Clement*, 254 Mich App 387, 390–391 (2002).

*See Section 3.38 for more information.

A defendant may not appeal a plea-based conviction on grounds related to the prosecution's capacity to prove the defendant's factual guilt—an appellate challenge to the state's evidence against the defendant is subsumed by a defendant's guilty plea. *People v New*, 427 Mich 482, 491 (1986). The same is true for a defendant's appeal of a conviction based on a plea of nolo contendere:

> "Since a plea of nolo contendere indicates that a defendant does not wish to contest his factual guilt, any claims or defenses which relate to the issue of factual guilt are waived by such a plea. Claims or defenses that challenge a state's capacity or ability to prove defendant's factual guilt become irrelevant upon, and are subsumed by, a plea of nolo contendere. . . . . Only those defenses which challenge the very authority of the state to prosecute a defendant may be raised on appeal after entry of a plea of nolo contendere." *New*, *supra* at 493 (footnote omitted).

For offenses over which a circuit court has jurisdiction, where a plea is withdrawn or vacated, a case may proceed to trial on any charges previously brought against the defendant or on any charges that could have been brought against the defendant if he or she had not entered a plea. MCR 6.312.

A defendant may waive his or her right to appeal from a plea-based conviction in exchange for sentencing or charging concessions. *People v Cobbs*, 443 Mich 276, 285 (1993).

3.41 OUIL/UBAC Pleas

Before the court accepts a plea of guilty or no contest for misdemeanor violations of MCL 257.625(1) (operating a motor vehicle while intoxicated), MCL 257.625(2) (allowing another person to operate a motor vehicle while intoxicated or visibly impaired), MCL 257.625(3) (operating a motor vehicle while visibly impaired), MCL 257.625(6) (zero tolerance), or MCL 257.625(8) (operating a motor vehicle with the presence of drugs) the court must advise the defendant of the following:

- the maximum possible term of imprisonment;
- the maximum possible fine; and
- that the maximum possible licensing sanctions will be determined based on the defendant's master driving record (kept by the Secretary of State according to MCL 257.204a).

MCL 257.625b(4).

The court may accept a defendant's plea to these violations at the conclusion of the pretrial conference held in compliance with MCL 257.625b(2). See Section 3.19 for information on the court's conduct of arraignments in cases involving misdemeanor violations of specified sections of MCL 257.625.

3.42 Marine Safety Act Pleas

A person arrested for violating the Marine Safety Act who was given a written notice to appear may tender a plea of guilty or not guilty in person, by representation, or by mail. MCL 324.80168(4). The magistrate or district court judge may accept the plea for purposes of arraignment "with the same effect as though the person personally appeared before him or her." *Id*.

Part C—Reference Material

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3.43 Checklist for Misdemeanor Arraignments

Date: _____ Offense: _____

Case No. _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

---

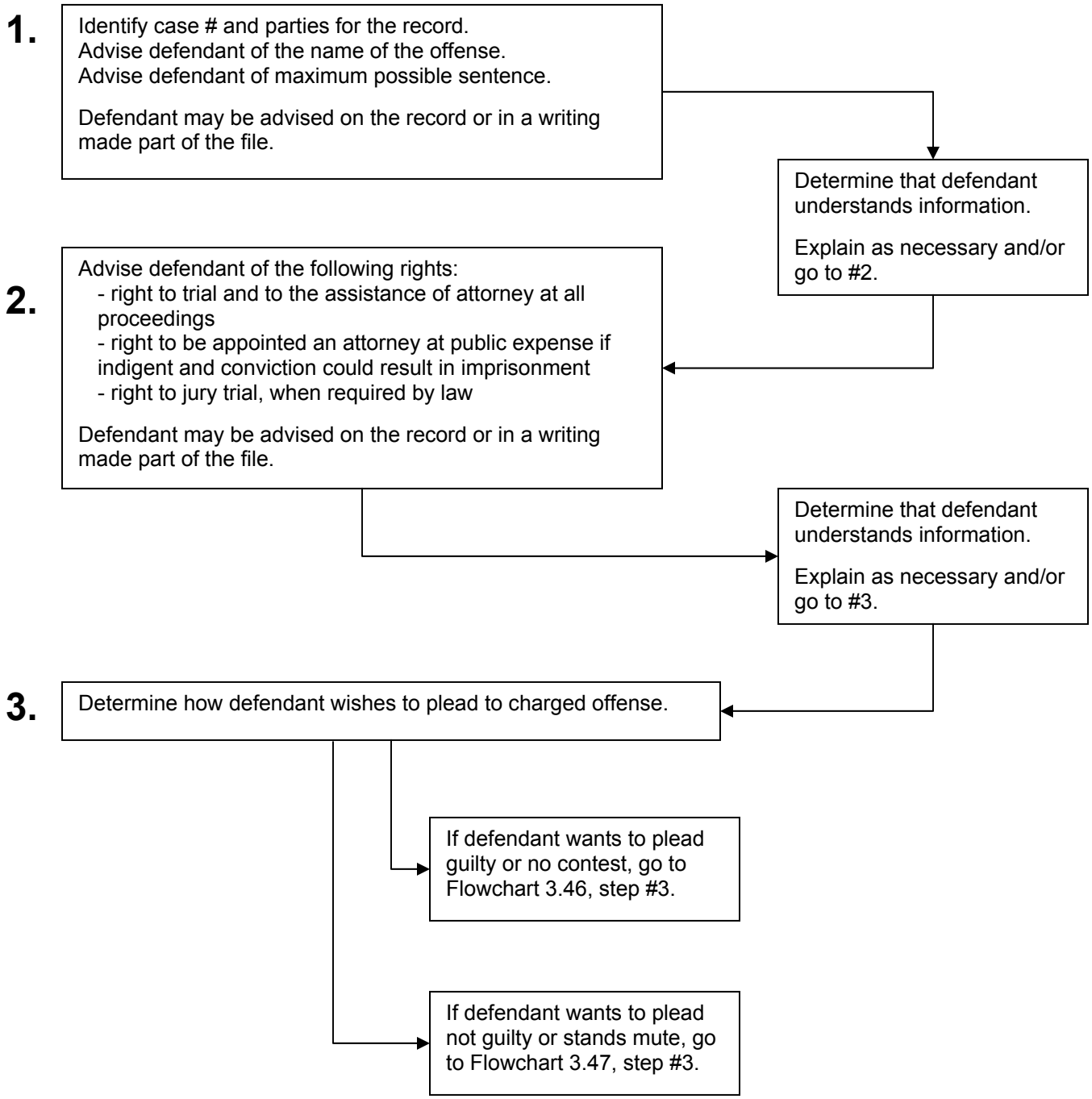
1. ❑ Identify case number and parties for the record.*
2. ❑ Advise defendant of the name of the offense.*
3. ❑ Advise defendant of the maximum sentence possible for conviction of the offense.*
4. ❑ Advise defendant of any mandatory minimum sentence required for conviction of the crime.
5. ❑ Advise defendant of the following rights:*
   a. ❑ the right to the assistance of an attorney at all proceedings.
   b. ❑ the right to a trial.
   c. ❑ the right to be appointed an attorney at public expense if defendant is indigent and conviction could result in imprisonment.
   d. ❑ the right to a jury trial, when required by law.
6. ❑ Determine how defendant wishes to plead:
   a. ❑ Not guilty or stands mute.
   b. ❑ Guilty.**
   c. ❑ No contest.**
7. ❑ Set bail.
8. ❑ Advise defendant of any conditions attendant to his or her pretrial release.

---

* The information contained in numbers 1, 2, 3 and 5 may be given to defendant on the record or in a writing made part of the file.

** When defendant pleads guilty or no contest, see Section 3.45, *Checklist for Guilty and No Contest Pleas*.

3.44 Flowchart for Misdemeanor Arraignments



3.45 Checklist for Guilty and No Contest Pleas

Date: _____ Offense: _____

Case No. _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

If defendant's plea immediately follows his or her arraignment, begin with number 5 below.

1. ❑ Identify case number and parties for the record.*
2. ❑ Advise defendant of the name of the offense.*
3. ❑ Advise defendant of the maximum sentence possible for conviction of the offense.*
4. ❑ Advise defendant of any mandatory minimum sentence for conviction of the charged offense.
5. ❑ Before accepting defendant's plea in cases involving MCL 257.625(1), (2), (3), or (6), advise defendant of maximum possible sentence/fine, and inform defendant that maximum possible license sanctions are based on master driving record maintained by Secretary of State.
6. ❑ Advise defendant of the following rights:*
   a. ❑ the right to the assistance of an attorney at all proceedings.
   b. ❑ the right to a trial.
   c. ❑ the right to an attorney at public expense if defendant is indigent and conviction could result in term of imprisonment.
   d. ❑ the right to a jury trial, when required by law.
7. ❑ Determine how defendant wishes to plead:
   a. ❑ Guilty.
   b. ❑ No contest.
   c. ❑ Not guilty or stands mute. See Section 3.47, *Flowchart for Not Guilty Pleas*.
8. ❑ Advise defendant of the consequences of his or her guilty or no contest plea if accepted:
   a. ❑ If plea is accepted, defendant will not have a trial of any kind.
   b. ❑ If plea is accepted, defendant gives up right to have defense witnesses called at trial.**
   c. ❑ If plea is accepted, defendant gives up right to cross-examine prosecution witnesses at trial.**
   d. ❑ If plea is accepted, defendant gives up the right to testify or to remain silent without any inference being drawn from defendant's exercise of the right to remain silent.**
   e. ❑ If plea is accepted, defendant gives up the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt.**

9. ❑ Obtain defendant's waiver of these trial rights on the record. If a writing was used to advise defendant of trial rights, defendant must state on the record that he or she read, understood, and waived the rights. The individual rights need not be repeated.

10. ❑ Determine that the plea is understanding and voluntary.

    a. ❑ Ask the defendant whether anyone has threatened him or her.

    b. ❑ Ask the defendant whether it is the defendant's own choice to plead guilty.

    No plea agreement in place.

    c. ❑ If there does not yet exist an agreement, either party may ask the court to indicate on the record what sentence it believes is appropriate based on the information then available to it.

    d. ❑ If there is no plea agreement, ask the defendant whether anyone has promised him or her anything.

    Plea agreement exists.

    e. ❑ If there is a plea agreement or sentence bargain, place the terms of the agreement on the record and determine that all parties agree.

    f. ❑ If the agreement contains a non-binding prosecutorial sentence recommendation, the court may:

        i. ❑ reject the agreement and indicate what sentence the court believes is appropriate.

        ii. ❑ accept the agreement subject to review of a presentence report or the receipt of additional information relevant to defendant's sentence.

    g. ❑ If there is a plea agreement, ask the defendant whether he or she has been promised anything outside what is reflected in the plea agreement.

11. ❑ Determine that the plea is accurate by establishing a factual basis for the plea:***

    a. ❑ For no contest pleas, the court may not question defendant about his or her involvement in the charged crime. A factual basis for the plea must be established using other available information.

    b. ❑ For guilty pleas, the court may question defendant about his or her role in the charged offense to establish a factual basis for the plea.

12. ❑ Set or continue bail.

13. ❑ Advise or remind defendant of any conditions attendant to his or her release.

---

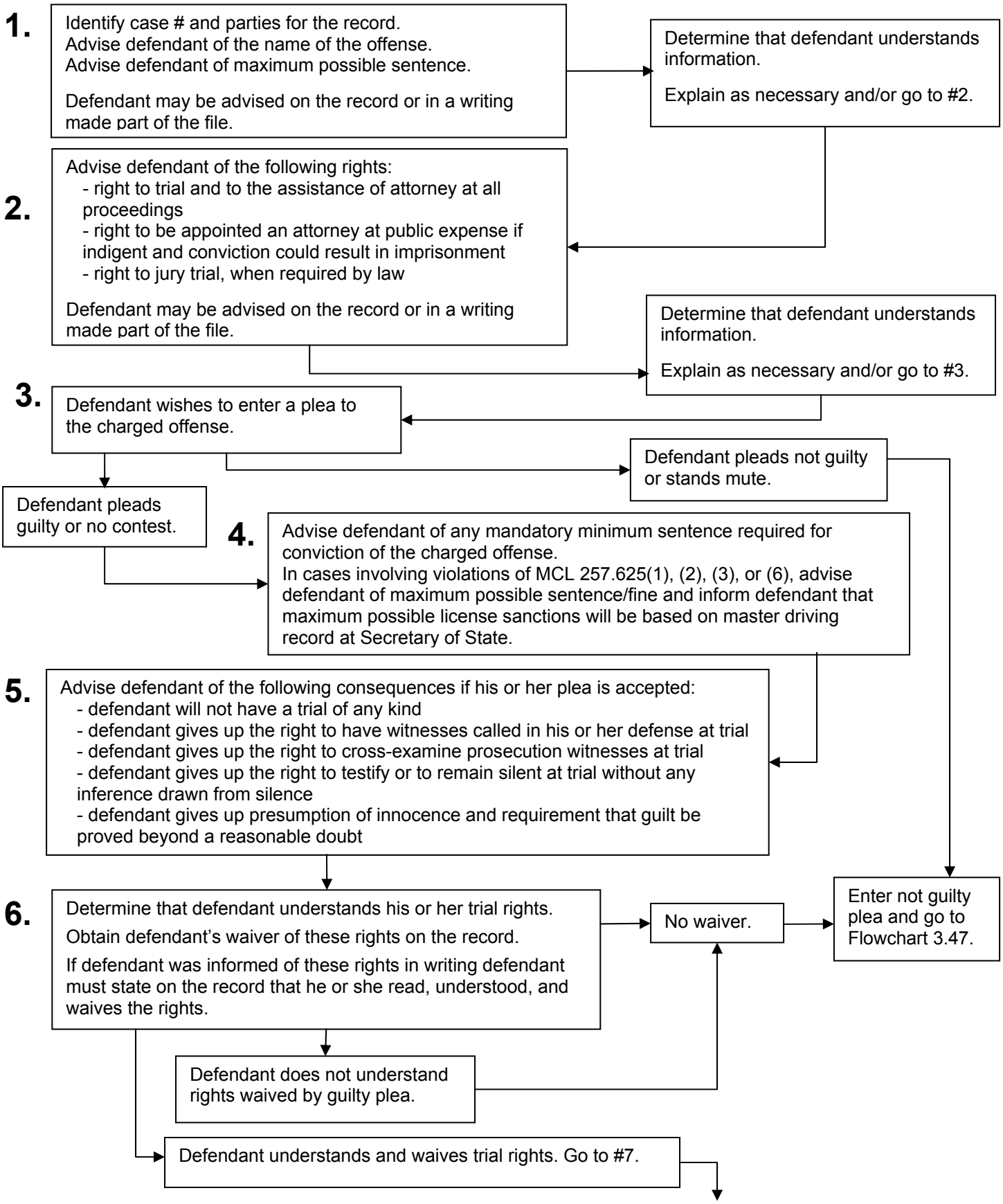
* The information contained in numbers 1, 2, 3 and 6 may be given to defendant on the record or in a writing made part of the file.

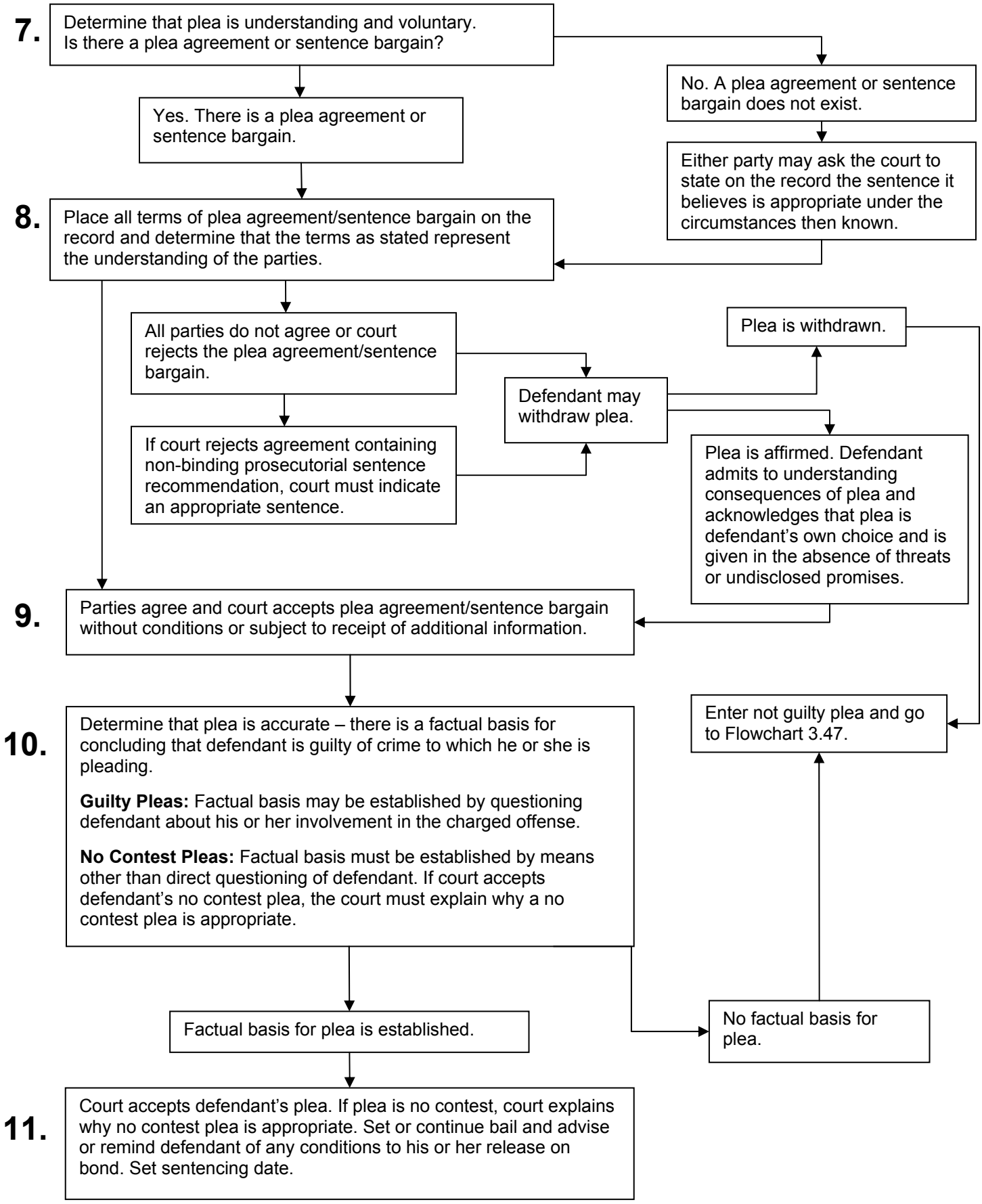
** This information may be given to defendant on the record, in a writing made part of the file, or in a writing referred to on the record.

*** Venue may need to be verified as part of establishing a factual basis for the plea.

3.46 Flowchart for Guilty and No Contest Pleas

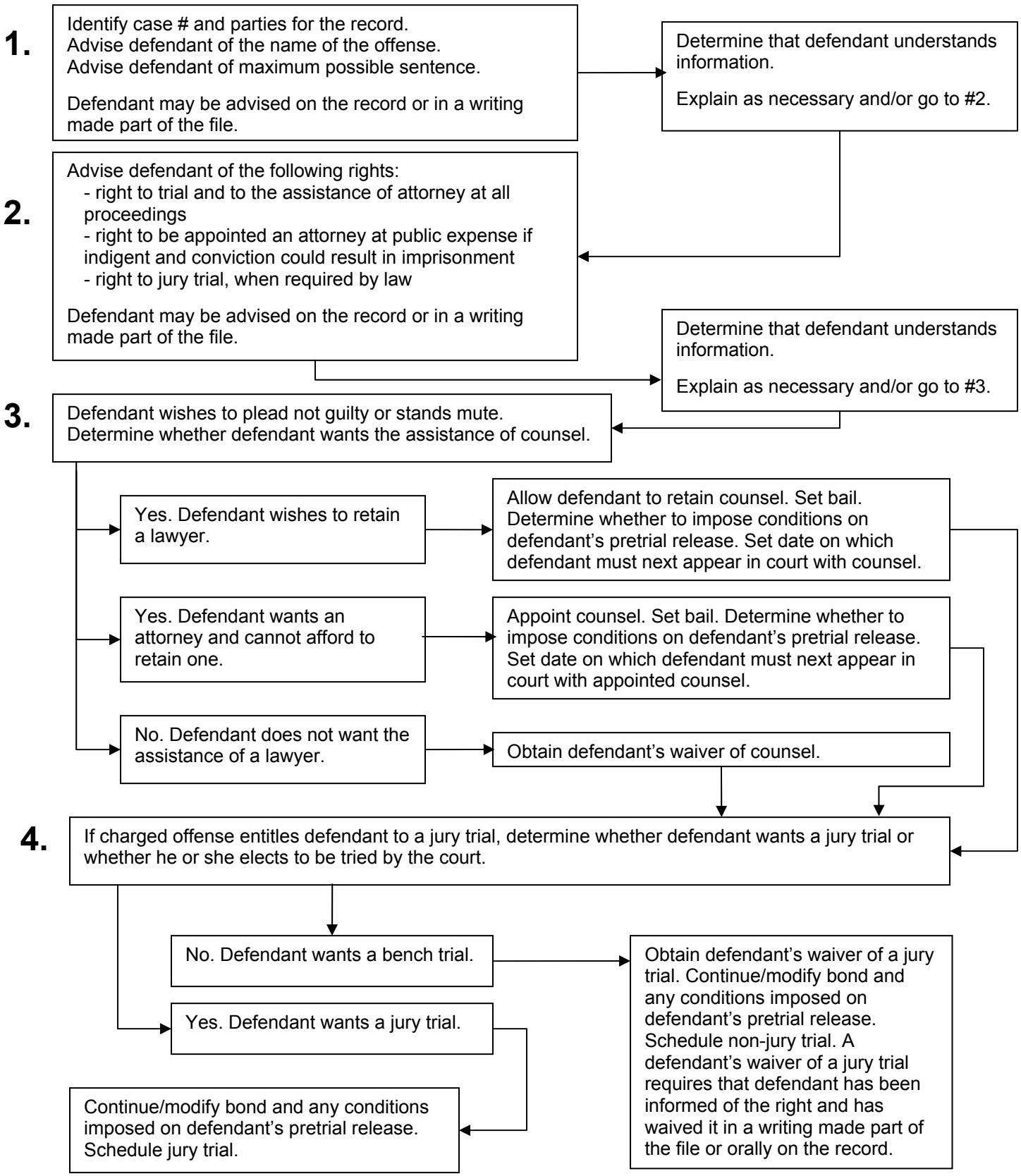
If defendant's plea immediately follows his or her arraignment, begin with #3 below.




7.
Determine that plea is understanding and voluntary. Is there a plea agreement or sentence bargain?
No. A plea agreement or sentence bargain does not exist.
Either party may ask the court to state on the record the sentence it believes is appropriate under the circumstances then known.
Yes. There is a plea agreement or sentence bargain.
8.
Place all terms of plea agreement/sentence bargain on the record and determine that the terms as stated represent the understanding of the parties.
All parties do not agree or court rejects the plea agreement/sentence bargain.
Plea is withdrawn.
Defendant may withdraw plea.
If court rejects agreement containing non-binding prosecutorial sentence recommendation, court must indicate an appropriate sentence.
Plea is affirmed. Defendant admits to understanding consequences of plea and acknowledges that plea is defendant's own choice and is given in the absence of threats or undisclosed promises.
9.
Parties agree and court accepts plea agreement/sentence bargain without conditions or subject to receipt of additional information.
Enter not guilty plea and go to Flowchart 3.47.
10.
Determine that plea is accurate – there is a factual basis for concluding that defendant is guilty of crime to which he or she is pleading.
Guilty Pleas: Factual basis may be established by questioning defendant about his or her involvement in the charged offense.
No Contest Pleas: Factual basis must be established by means other than direct questioning of defendant. If court accepts defendant's no contest plea, the court must explain why a no contest plea is appropriate.
Factual basis for plea is established.
No factual basis for plea.
11.
Court accepts defendant's plea. If plea is no contest, court explains why no contest plea is appropriate. Set or continue bail and advise or remind defendant of any conditions to his or her release on bond. Set sentencing date.

3.47 Flowchart for Not Guilty Pleas

If defendant's plea immediately follows his or her arraignment, begin with #3 below.



3.48 Script for Misdemeanor Arraignments and Pleas

(with required procedure and authority)

Procedure/Authority	Script
1. Identify case number and confirm that defendant is the person referred to in title of the case. Ask counsel for the parties to identify themselves for the record.	**1.** This is case number _____ . People v _____ . To defendant: Are you that person? Would the prosecutor and defense counsel please identify themselves for the record?
2. Advise defendant of the name of the offense. MCR 6.610(D)(1)(a). This may be done in writing or on the record.	**2.** You are charged with (name of offense) .
3. Advise defendant of the maximum possible sentence for conviction of the offense. MCR 6.610(D)(1)(b). This may be done in writing or on the record. (A defendant wishing to plead guilty or no contest to the charged offense must be advised of any mandatory minimum sentence required for conviction of the offense. See step # 6. Although this advice is required only when a defendant pleads guilty or no contest, the court may find it more expedient to include advice of any mandatory minimum along with the required advice of the possible maximum sentence.)	**3.** The maximum penalty for this offense is: _____ .
4. Advise defendant of the following rights:	**4.** To defendant:
a. the right to the assistance of an attorney at all proceedings. MCR 6.610(D)(1)(c)(*i*).	**a.** You have the right to the assistance of an attorney at all proceedings.
b. the right to trial, MCR 6.610(D)(1)(c)(*i*), and the right to a jury trial, when required by law. MCR 6.610(D)(1)(c)(*iii*).	**b.** You have the right to trial, including a trial by jury, when required by law. (or) You have the right to a trial before a judge, but the offense with which you are charged does not entitle you to a jury trial.
c. the right to an appointed attorney at public expense if defendant is indigent and conviction could result in imprisonment. MCR 6.610(D)(1)(c)(*ii*).	**c.** If you cannot afford to hire an attorney and conviction of the charged offense could result in incarceration, the court will appoint an attorney to represent you.
5. Determine how defendant wishes to plead.	**5.** How do you wish to plead?
a. If defendant pleads guilty or no contest, go to step # 6.	
b. If defendant pleads not guilty or stands mute, go to step # 15.	

6. Advise defendant wishing to plead guilty or no contest of any mandatory minimum sentence required for conviction of the charged offense. MCR 6.610(E)(3)(a).	**6.** Conviction of the offense with which you are charged requires a mandatory minimum sentence of imprisonment. If the court accepts your guilty or no contest plea you will be sentenced accordingly. Do you understand?
7. Advise defendant wishing to plead guilty or no contest to misdemeanor violations of MCL 257.625(1), (2), (3), or (6) of the maximum possible sentence/fine and inform defendant that maximum possible license sanctions imposed are based on the master driving record maintained by the Secretary of State.	**7.** The maximum possible sentence/fine for conviction of the violation with which you've been charged is _____ . The maximum possible license sanctions for conviction will be determined based on the master driving record maintained by the Secretary of State. If the court accepts your guilty or no contest plea, you will be sentenced accordingly. Do you understand?
8. Advise defendant of the consequences of his or her plea if accepted:	**8.** To defendant:
a. defendant will not have a trial of any kind. MCR 6.610(E)(3)(b).	**a.** If the court accepts your plea, you will not have a trial of any kind for the charged offense.
b. defendant gives up the right to have witnesses called in his or her defense at trial.* MCR 6.610(E)(3)(b)(*i*).	**b.** If your plea is accepted, you give up the right to have witnesses called to testify in your defense at trial.
c. defendant gives up the right to cross-examine prosecution witnesses at trial.* MCR 6.610(E)(3)(b)(*ii*).	**c.** If your plea is accepted, you give up the right to cross-examine the prosecution's witnesses at trial.
d. defendant gives up the right to testify at trial or to remain silent at trial without any inference being drawn from his or her silence.* MCR 6.610(E)(3)(b)(*iii*).	**d.** If your plea is accepted, you give up the right to testify or remain silent at trial without any inference being drawn from the exercise of your right to remain silent.
e. defendant gives up the presumption of innocence and the requirement that his or her guilt be proved beyond a reasonable doubt.* MCR 6.610(E)(3)(b)(*iv*).	**e.** If your plea is accepted, you give up the presumption of innocence and the requirement that the prosecution must prove guilt beyond a reasonable doubt.
9. Obtain defendant's waiver of these trial rights on the record. MCR 6.610(E)(4). If defendant was informed of the rights in a writing, the court must obtain an oral statement from defendant that he or she read and understood the rights and waives them. The waiver may be obtained without repeating the individual rights. MCR 6.610(E)(4).	**9.** Do you understand that you will waive the right to trial and all the rights that accompany your right to trial if the court accepts your guilty or no contest plea? Do you wish to waive those rights as they were explained to you? (or) Have you read the written statement of trial rights? Do you understand the trial rights to which you are entitled? Is it your choice to waive those rights and enter a plea?
* This information may be given to the defendant in writing.	

10. Determine that defendant's plea is understanding and voluntary. MCR 6.610(E)(1). Ask defendant whether anyone has threatened him or her and whether it is defendant's own choice to plead guilty. MCR 6.610(E)(6)(a) and (b).	**10.** Is it your voluntary choice to plead guilty/no contest? Has anyone threatened you about your plea?
11. Determine whether there exists a plea agreement or sentence bargain. **No plea agreement.** If no plea agreement exists, ask defendant whether anyone has promised him or her anything for the guilty plea. MCR 6.610(E)(6)(a). If no plea agreement exists, either party may ask the court to indicate on the record what sentence it believes is appropriate based on the information then available to it. **Plea agreement.** If there exists a plea agreement or sentence bargain, place its terms on the record and determine whether the parties agree to the terms. MCR 6.610(E)(5). Ask defendant whether anyone promised him or her anything outside of the terms of the agreement. MCR 6.610(E)(6)(a).	**11.** Is there a plea agreement or sentence bargain at issue in this case? No plea agreement is involved in this case. Has anyone promised you anything in exchange for your guilty plea? (In the absence of an agreement, court may be asked to indicate an appropriate sentence.) (or) There is a plea agreement in this case. Explain the agreement to the court. Do both parties agree on the terms of the agreement? Has anyone promised you anything outside the terms of the agreement?
12. Accept, reject, or conditionally accept the plea agreement/sentence bargain. MCR 6.610(E)(5).	**12.** The court accepts the plea agreement/ sentence bargain reached by the parties and is prepared to impose sentence in compliance with the terms of the agreement. (or) The court rejects the plea agreement/ sentence bargain as proposed by the parties. You may affirm or withdraw your plea. (In cases involving non-binding prosecutorial sentence recommendations, the court must indicate what it considers a more appropriate sentence). (or) The court conditionally accepts the plea agreement/sentence bargain reached by the parties. If, at sentencing, the court decides to impose a longer sentence than the one agreed on, the defendant will have the right to withdraw his or her plea.
13. Determine that defendant's plea is accurate by establishing a factual basis for concluding that defendant is guilty of the offense to which he or she is pleading. MCR 6.610(E)(1). **No contest pleas:** the court may NOT question defendant about his or her involvement in the crime. A factual basis for defendant's guilt must be established by other available information. MCR 6.610(E)(1)(b).	**13. Guilty pleas only:** Did you commit the crime alleged in the complaint or warrant? Explain your involvement in the crime. **No contest pleas:** The court must establish a factual basis for your plea by using available information. (The court may review a police report or take testimony from an available witness to establish the factual basis.)

14. Set or continue bail. Impose sentence or schedule date for sentencing. Determine whether to impose conditions on defendant's presentencing release.	**14.** The court accepts your plea. Sentencing is set for (date and time). Bail is set/continued at $____. You are ordered to comply/continue complying with the following conditions of your release. (or) The court accepts your plea. The court sentences you to _____.
15. Acknowledge defendant's not guilty plea or if defendant stands mute, enter a not guilty plea on his or her behalf. Determine whether defendant wishes the assistance of counsel and if so, whether counsel must be appointed.	**15.** You have pleaded not guilty to the charged offense (or a plea of not guilty has been entered for you). Therefore, the case will proceed to trial. Do you wish to have the assistance of an attorney?
a. If defendant is indigent and wants the assistance of counsel and a conviction could result in imprisonment, the court must appoint an attorney. MCR 6.610(D)(2).	**a.** You have asked for the assistance of counsel and qualify for a court-appointed attorney. The court appoints/will appoint (name of attorney or date set for appointment) to represent you.
b. If defendant can afford to retain an attorney, inform him or her of the time available before trial in which he or she must obtain representation.	**b.** You have expressed the desire for the assistance of counsel, and you do not qualify for a court-appointed lawyer. The court will allow you (length of time) to retain an attorney.
c. If defendant does not wish to be represented by an attorney, go to step # 17.	
16. Set bail, determine whether defendant's pretrial release should be accompanied by conditions, schedule next court date, and adjourn proceedings.	**16.** Bail is set at $_____. As (a) condition(s) of bail, you are ordered to comply with the following conditions of bond: (list of conditions). You must appear with counsel (appointed or retained) before the court on (date) at (time). This hearing is adjourned.
17. If defendant does not wish the assistance of counsel:	**17.** To defendant:
a. Obtain defendant's waiver of counsel for the record. To waive counsel, defendant must be informed of right and waive it orally on the record or in a writing made part of the file. MCR 6.610(D)(3)(a)-(b).	**a.** You have indicated that you do not want the assistance of an attorney. Do you understand that you have the right to be represented by counsel, and that if you are indigent and conviction might result in imprisonment, you have the right to a court-appointed lawyer? Do you wish to waive these rights?
b. Determine whether defendant wants a jury trial. Waiver of jury trial must be on the record or in a writing made part of the file. MCR 6.610(D)(3)(b) and MCL 763.3(1)-(2). See SCAO Form MC 260.	**b.** You have pleaded not guilty and elected not to be represented by an attorney. Do you want a jury trial?